SUPREME COURT, U.S.
FILED

(1)

No. 00-1053 DEC 21 2000

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IN THE
SUPREME COURT OF THE UNITED STATES

ALAN L. MATHENEY,

Petitioner-Appellee,

-v.-

RONDLE ANDERSON,

Respondent-Appellant.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

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203 pp

CAPITAL CASE

QUESTION PRESENTED

Did the Seventh Circuit properly remand the case for an evidentiary hearing where the issue of competency had been litigated in state courts?

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JURISDICTION

This Court has jurisdiction of this petition under 28 U.S.C. § 1254(1). On June 18, 2001, the Seventh Circuit Court of Appeals affirmed in part and remanded for an evidentiary hearing the decision of the district court. Following an enlargement of time to request rehearing, on July 13, 2001, both parties requested rehearing. Rehearing was denied on August 28, 2001.

The Court of Appeals had jurisdiction to hear the appeal from the denial of a writ of habeas corpus pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253.

OPINIONS BELOW

Matheney's convictions and capital sentence were affirmed by the Supreme Court of Indiana on January 9, 1992. *Matheney v. State*, 583 N.E.2d 1202 (Ind. 1992). A copy of that opinion is attached as Appendix A. The Indiana Supreme Court affirmed the denial of post-conviction relief on November 24, 1997. *Matheney v. State*, 688 N.E.2d 883 (Ind. 1997). A copy of that opinion is included as Appendix B. Following briefing and argument, the district court denied the habeas corpus petition on August 2, 1999. *Matheney v. Anderson*, 60 F. Supp. 2d 846 (N.D. Ind. 1999). A copy of that decision is attached as Appendix C. On June 18, 2001, the Seventh Circuit Court of Appeals affirmed in part and remanded for an evidentiary hearing the decision of the district court. *Matheney v. Anderson*, 253 F.3d 1025, 1040-41 (7th Cir. 2001). A copy of that opinion is attached as Appendix D.

STATUTE INVOLVED

The issue presented in this case involves the propriety of an evidentiary hearing in a habeas corpus case pursuant to 28 U.S.C. § 2254(e)(2).

STATEMENT OF THE CASE

On March 7, 1989, Alan Matheney, was charged by information with murder and burglary. On March 20, 1989, the information was amended by adding Counts III and IV which alleged the presence of two aggravating circumstances for the purpose of imposing capital punishment.

On April 11, 1990, the jury returned a guilty verdict on both murder and burglary. On April 12, 1990, the jury recommended imposition of the death penalty. The trial court accepted the jury's recommendation and sentenced petitioner to death on May 11, 1990. *Matheney*, 583 N.E.2d at 1204.

On January 9, 1992, the Indiana Supreme Court affirmed petitioner's convictions and death sentence. *Matheney*, 583 N.E. 2d 1202. Petitioner filed a writ of certiorari which was denied by the United States Supreme Court on June 1, 1992. *Matheney v. Indiana*, 504 U.S. 962 (1992).

On November 25, 1992, petitioner filed a petition for post-conviction relief in the Lake Superior Court, Lake County, Indiana. An evidentiary hearing was granted on some of petitioner's claims. On April 10, 1995, the superior court denied the petition in its entirety. The Indiana Supreme Court affirmed the denial of petitioner's petition for post-conviction relief on November 24,

1997 and denied his petition for rehearing on March 31, 1998. *Matheney*, 688 N.E. 2d 883 (Ind. 1997).

The United States Supreme Court denied the petition for writ of certiorari on February 22, 1999. *Matheney v. Indiana*, 119 S.Ct. 1046 (1999).

On July 11, 1998, the petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana. On July 30, 1999 the District Court denied the habeas petition and entered judgment in favor of the respondent on August 2, 1999. *Matheney v. Anderson*, 60 F. Supp. 2d 846 (N.D. Ind. 1999).

On August 10, 1999, petitioner filed a motion pursuant to Fed. R. Civ. P. (59) (e) and Rule 52 (b) to alter or amend the August 2, 1999 judgment in the District Court, which was denied on September 16, 1999. Judgment was entered on September 17, 1999.

On October 12, 1999, petitioner filed a Certificate of Appealability with the District Court which was granted in part and denied in part on October 25, 1999.

On June 18, 2001, the Seventh Circuit Court of Appeals affirmed in part and remanded for an evidentiary hearing the decision of the district court. *Matheney*, 253 F.3d at 1040-41. Following an

enlargement of time to request rehearing, on July 13, 2001, both parties requested rehearing. Rehearing was denied on August 28, 2001.

REASONS TO GRANT THE PETITION

I.
This Case Presents a Substantial Federal Issue Requiring Immediate Review.

On June 18, 2001, the Court of Appeals ordered the district court to hold an evidentiary hearing to address Matheney's competency to stand trial, counsel's possible ineffective assistance for failing to pursue the competency issue, and to determine whether the trial court was required to *sua sponte* address Matheney's competency. *Matheney*, 253 F. 3d at 1040-41.

The decision to remand conflicts with precedent of this Court. Specifically, Matheney is not entitled to an evidentiary hearing under *Williams v. Taylor*, 529 U.S. 420 (2000), the relevant law, and prior precedent of this court. The issue of Matheney's competence was litigated in state court. In reviewing this claim, the Indiana Supreme Court summarized this evidence as follows:

> On March 14, 1989, Matheney's trial counsel filed a notice of insanity defense and requested examination by a psychiatrist for determining Matheney's competence to stand trial. On March 27 the trial court appointed Drs. Berkson and

Batacan "for the purposes of determining [Matheney's] competency to stand trial and sanity." (T.R. at 7). Dr. Batacan examined Matheney on April 12 and June 21, 1989, and Dr. Berkson examined Matheney on April 14, 1989. Neither found the presence of mental disease or defect. Dr. Berkson stated that during his examination Matheney had no difficulty responding promptly to his questions, organizing his thoughts, or putting his thoughts together in a logical, sequential order. Dr. Berkson also testified he had examined Matheney two years earlier in relation to a previous criminal matter and had found Matheney competent at that time.

While trial counsel believed Matheney to be mentally ill, they did not believe it prevented him from understanding the proceedings or from assisting in his own defense. Charles Lahey, one of Matheney's trial counsel, testified "Despite his obsessive conduct, I didn't find [Matheney] that incapable of planning his own defense. In fact, he was actively planning it although it wasn't right in all regards." (P.C.R. at 1500). When asked, "In your opinion did Mr. Matheney have a general idea of how the legal system operated and what he was being charged with and the gravity of the situation," Lahey replied, "Yes, I did think that he did." (P.C.R. at 1516). Asked if he thought Matheney was competent to assist him with the defense, Lahey responded that while Matheney was of little help to them, he did not believe Matheney's lack of help was due to incompetence, as that term is legally understood. (*See id.* at 1542-43). Philip Skodinski, another of Matheney's trial counsel, when asked if Matheney was competent to assist, replied, "I think he was... He certainly understood what he was charged with or what evidence [sic] to find he was not guilty. In that regard I guess he was competent to assist in his own defense." (P.C.R. at 1734).

Matheney, 688 N.E.2d at 899. Furthermore, the Indiana Supreme Court determined that counsel were not ineffective for failing to pursue the competency issue at trial based upon the reports of the doctors. *Id.*

The law concerning evidentiary hearings on federal collateral review under the AEDPA provides as follows:

> (e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the [C]ourt *shall not* hold an evidentiary hearing on the claim unless the applicant shows that –
>
> the claim relies on:
>
> a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (emphasis added).

The Court of Appeals incorrectly decided a further evidentiary hearing was necessary. The Court remanded the case to the district court so as to determine:

> 1) whether Matheney was competent to stand trial in 1990;
> 2) whether Matheney's counsel were ineffective when they

> failed to pursue the initial request for a competency hearing; and 3) whether the state trial court was obligated to hold a competency hearing *sua sponte*.

Matheney, 253 F.3d at 1040-41.

However, federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings. *Williams*, 529 U.S. at 437. Yet, the decision of the Court of Appeals allows district courts to hold evidentiary hearings to determine facts that were known and litigated simply because the trial attorneys ought to have litigated it differently. In other words, the Court of Appeals, unsatisfied with the resolution of the known and litigated issue in the state courts, has ordered further evidentiary hearings concerning Matheney's competency. Rather than decide the legal issues of whether the attorneys were ineffective in their representation or whether the state courts reached a conclusion that was correct and reasonable under precedent from this Court, the Court of Appeals has ordered a hearing to produce evidence on an issue that has already been litigated in state court. This is inappropriate for a habeas court and dramatically expands the discretion possessed by courts reviewing habeas petitions to order evidentiary hearings.

II.
Matheney is not entitled to an evidentiary hearing on his competency at trial.

First, it bears noting that § 2254(e)(2)(A)(i) is inapplicable because Matheney does not claim relief under a new rule of constitutional law. Furthermore, § 2254(e)(2)(B) appears to be satisfied, in that if Matheney were not competent to be tried, no trial would have occurred in which Matheney could have been found guilty. Therefore, the issue is whether Matheney satisfied § 2254(e)(2)(A)(ii), as that clause has been interpreted.

Matheney is not entitled to an evidentiary hearing to determine whether he was competent to stand trial because he exercised the required diligence to make the claim he was not competent. In *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 789, 4 L.Ed.2d 824, 825 (1960), this Court held that the legal standard for competency to stand trial was whether the defendant possesses "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." Matheney sufficiently developed the factual predicate to this claim in state court to disallow himself of an evidentiary hearing.

As noted by the decision of the Court of Appeals, Matheney argued and presented evidence at the post-conviction

proceedings that he was not competent. Specifically, Matheney presented deposition testimony, affidavits, and testimony. *Matheney*, 253 F.3d at 1035-37. This evidence included the expert opinions of doctors, as well as the testimony of his trial attorneys. *Id.* The post-conviction court determined, on the evidence adduced, that Matheney was competent to proceed with the post-conviction proceedings. *Id.* at 1037. The post-conviction court also looked at the record evidence consisting of Matheney's *pro se* criticisms of his attorneys, as well as the criticisms of the trial court's decisions. *Id.* Matheney argued on appeal that he was not competent to be tried. *Id.* The Indiana Supreme Court determined, based on the evidence presented, that he was competent to be tried. *Id.*; *Matheney*, 688 N.E.2d at 899. He argued to the district court that he was not competent to be tried. *Matheney*, 60 F. Supp.2d at 859-63. The district court determined, based on the record evidence, that he was competent to be tried. *Id.* at 863. At each and every stage of this proceeding, Matheney has diligently argued, and when possible, presented evidence that he was not competent. The factual predicate to Matheney's claim was not only discovered, but litigated, prior to the filing of the petition for a writ of habeas corpus.

The remand order from the Court of Appeals will simply relitigate that which was litigated in state post-conviction proceedings. An evidentiary hearing at this point in the proceedings will offer no better evidence than that already present in the record. In support of his claim of incompetency, Matheney has the reports prepared prior to trial, reports prepared prior to the post-conviction proceedings, and the testimony of his attorneys that support his claim of incompetence to be tried. *See Matheney*, 253 F.3d at 1034-35.

In support of Matheney's competency, there is the testimony of his trial attorneys, that they believed him to be competent, as well as the inferences from the reports of the other two doctors. *Id.*; *Matheney*, 60 F.Supp.2d at 861-62.

Any new evidence that is generated will only corroborate one of these two opposing views. Therefore, the record is sufficient to determine whether Matheney was competent to stand trial.

The decisions of the Indiana Supreme Court and the district court concerning Matheney's competence were not contrary to or an unreasonable application of this Court's precedent in this area. 28 U.S.C. §2254(d); *Williams v. Taylor*, 529 U.S. 362,

376 (2000). The decision of the district court denying relief should be affirmed.

Also, the decision of the Court of Appeals suggests that the district court could avail itself of further expert testimony and stated that it could not "say that Matheney, (rather than counsel) 'failed' to establish a record sufficient to analyze his claims on appeal...." *Matheney*, 253 F.3d. at 1038-39, 1041, n. 16. This suggests both that Matheney's efforts to develop a factual predicate are divorced from those of his attorneys, and that the attorneys at the state post-conviction proceeding failed to properly investigate the claims. However, in the context of whether a petitioner has diligently pursued a claim, the actions of his attorneys are attributable to him. *See Williams*, 529 U.S. at 432 ("a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel"). Also, to the extent that the Court of Appeals based its determination on a finding that *post-conviction counsel* should have presented more or different evidence, that finding of ineffectiveness is non-cognizable for federal habeas review. *Coleman v. Thompson,* 501 U.S. 722, 752, 111 S.Ct. 2546, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95

L.Ed.2d 539 (1987); *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989)).

In this case, it is inappropriate to hold another evidentiary hearing to allow Matheney to present evidence concerning competency that was not presented to the state courts. That issue was litigated and resolved in the state courts and the federal courts reviewing the case in habeas ought not revisit that factual issue.

III.

Matheney is not entitled to an evidentiary hearing on the ineffective assistance of counsel claim.

Likewise, Matheney is not entitled to an evidentiary hearing on his claim that counsel was ineffective for failing to pursue his competency prior to trial. Matheney pled, presented evidence, and argued this very claim in state post-conviction proceedings. *Matheney*, 688 N.E.2d at 899. The factual basis of the claim was developed, therefore there is no need for an evidentiary hearing.

Further, the analysis that led to the remand order failed to properly inquire whether the claim had been diligently investigated. *Matheney*, 253 F.3d at 1039-40. The factual development necessary to raise the ineffective assistance of counsel claim is different from that necessary to develop the existence of the free-standing claim of incomptence. The decision

of the Court of Appeals in this case failed to address whether there was a diligent effort to develop the factual predicate for deficient performance or prejudice.

Matheney is not entitled to an evidentiary hearing because the record shows thorough investigation of the factual predicate of this claim in the state proceedings. At the post-conviction proceeding, the attorneys testified concerning their views of Matheney's fitness to stand trial. *Matheney*, 60 F.Supp.2d at 861-63. This shows that the factual predicate for this claim had been discovered and developed at the state post-conviction level. Therefore, an evidentiary hearing at the habeas level is inappropriate. 28 U.S.C. § 2254(e)(2).

Furthermore, it is unclear what could be developed in a future evidentiary hearing. The trial attorneys filed a motion that included a request for a competency evaluation, so they presumably had a good faith belief that competency was an issue. However, they also testified Matheney not only was competent, but that he assisted them in their preparation for the case. Their testimony that Matheney was competent and did assist in his defense results in the lack of deficient performance for failing to pursue the competence issue, as well as the lack of prejudice

because if they did not believe their client was incompetent it is unlikely the trial court would so find.

In any event, on this issue, too, the findings of the Indiana Supreme Court should be given deference. 28 U.S.C. §2254(d); *Williams*, 529 U.S. at 376. Because the issue was available and diligently litigated, those courts were able to look to the record evidence and decide the claim. Those decisions should stand.

IV.
Matheney is not entitled to an evidentiary hearing on his claim that the trial court should have *sua sponte* inquired into his competency.

An evidentiary hearing is not required to determine whether the trial court was required to *sua sponte* order a competency evaluation. Similar to the claim of ineffective assistance of counsel, the analysis that led to the remand order on this point failed to properly inquire whether the claim had been diligently investigated. *Matheney*, 253 F.3d at 1040-41. A trial court is required to order a competency hearing when the facts *at the time of trial* create a *bona fide* doubt about an accused's fitness to stand trial. *Gosier v. Welborn*, 175 F.3d 504, 507 (7th Cir. 1999) (*citing Pate v. Robinson*, 383 U.S. 375, 80 S.Ct. 836 (1966)). There has been no allegation of *ex parte* contact between the trial court and Matheney. Also, there has been no allegation of off-the-

record dealings between Matheney and the trial court. Therefore, all contact between the trial court and Matheney is documented in the record. An evidentiary hearing at this point could shed no light on whether Matheney's actions while in court were sufficient to create a doubt about Matheney's fitness to stand trial. Therefore, it is inappropriate to order such an evidentiary hearing. There is sufficient information in the record to determine whether the trial court should have ordered an evaluation *sua sponte*.

WHEREFORE, the Respondent-Appellant respectfully request that this Court grant certiorari, vacate the order of the Court of Appeals, affirm the denial of habeas relief and for all other appropriate relief.

Respectfully submitted,

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EXHIBIT A

> 583 N.E.2d 1202

Supreme Court of Indiana.

Alan Lehman MATHENEY, Appellant,
v.
STATE of Indiana, Appellee.
No. 45S00-9002-DP-116.
Jan. 9, 1992.

Defendant was convicted by jury in the Lake Superior Court, James E. Letsinger, J., of murder and burglary and was sentenced to death. Defendant appealed. The Supreme Court, Givan, J., held that: (1) tendered instruction on voluntary manslaughter was properly refused; (2) no compelling need or extraordinary circumstances required court to compel testimony of prosecuting attorney in support of insanity defense; and (3) evidence supported lying in wait aggravating circumstance, and aggravators and mitigators were fully considered by trial court and jury in reaching death penalty sentence.

Affirmed.

Shepard, C.J., concurred in result.

DeBruler, J., concurred in part and dissented in part and filed opinion.

West Headnotes

> [1] Criminal Law K> 835
110 —
110XX Trial
110XX(H) Instructions: Requests
> 110k835 Refusal of Requests.
Test applied on review of trial court's decision to give or refuse tendered instruction is whether tendered instruction correctly states the law, whether there was evidence in record to support giving of instruction, and whether substance of tendered instruction was covered by other instructions which were given.

> [2] Homicide K> 40

203 —
203III Manslaughter
203k38 Sudden Passion or Heat of Passion
> 203k40 Time for Cooling.

[See headnote text below]

> [2] Homicide K> 295(1)
203 —
203VIII Trial
203VIII(C) Instructions
203k295 Passion and Provocation
> 203k295(1) In General.
Killing in the sudden heat of passion is element that distinguishes voluntary manslaughter from murder, but there must be sufficient provocation to induce such passion to render defendant incapable of cool reflection; therefore, evidence of anger alone does not support giving of instruction on voluntary manslaughter.

> [3] Homicide K> 42
203 —
203III Manslaughter
203k41 Provocation
> 203k42 Nature and Adequacy in General.
Words alone cannot constitute sufficient provocation to give rise to finding of sudden heat warranting instruction on voluntary manslaughter.

> [4] Homicide K> 152
203 —
203VII Evidence
203VII(A) Presumptions and Burden of Proof
> 203k152 Grade or Degree of Offense.

[See headnote text below]

> [4] Homicide K> 271
203 —
203VIII Trial
203VIII(B) Questions for Jury
> 203k271 Passion and Provocation.

For purposes of voluntary manslaughter charge, existence of sudden heat is determined by trier of fact and defendant has burden of showing its existence.

> [5] Homicide K> 308(1)
203 —
203VIII Trial
203VIII(C) Instructions
203k306 Grade or Degree of Offense
203k308 Murder
> 203k308(1) Form and Sufficiency in General.
Murder charge cannot be drafted so as to preclude possibility of conviction on voluntary manslaughter upon introduction of evidence that defendant acted in sudden heat and on acceptance of that evidence by jury.

> [6] Homicide K> 309(4)
203 —
203VIII Trial
203VIII(C) Instructions
203k306 Grade or Degree of Offense
203k309 Manslaughter
> 203k309(4) Necessity When Evidence Raises Issue.
If defendant meets his burden of proving sudden heat then State may not preclude giving of voluntary manslaughter instruction.

> [7] Criminal Law K> 29(14)
110 —
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
> 110k29(14) Homicide.
In absence of evidence of sudden heat it is State's prerogative to elect whether to proceed against defendant with murder or voluntary manslaughter charge, and absolute discretion rests in State to determine crimes with which defendant will be charged.

> [8] Criminal Law K> 795(2.90)
110 —
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k795 Grade or Degree of Offense; Included Offenses

> 110k795(2.90) Effect of Defendant's Objection or Defense Inconsistent with Lesser Charge.
Trial court can refuse to instruct jury as to lesser included offense in prosecution for murder where defense of insanity is used to disprove intent to commit greater offense and thus would not be compatible with inference of guilt of lesser included offense.

> [9] Witnesses K> 67
410 —
410II Competency
410II(A) Capacity and Qualifications in General
> 410k67 Attorney and Client.
Ordinarily, counsel is not subject to being called as a witness, although there are exceptions such as when counsel is believed to have material information that cannot be disclosed otherwise.

> [10] Witnesses K> 70
410 —
410II Competency
410II(A) Capacity and Qualifications in General
410k69 Judges, Jurors, and Judicial Officers, as Witnesses as to Proceedings by or Before Them
> 410k70 In General.
As general rule, prosecuting attorney cannot be called as defense witness unless testimony sought is required by compelling and legitimate need, and trial court in its discretion may deny request if prosecutor does not have information vital to case.

> [11] Witnesses K> 67
410 —
410II Competency
410II(A) Capacity and Qualifications in General
> 410k67 Attorney and Client.
Where evidence is easily available from other sources and absent "extraordinary circumstances" or "compelling reasons," attorney who participates in case should not be called as witness.

> [12] Witnesses K> 70
410 —
410II Competency
410II(A) Capacity and Qualifications in General

410k69 Judges, Jurors, and Judicial Officers, as Witnesses as to Proceedings by or Before Them
> 410k70 In General.
In murder prosecution, trial court could refuse to compel testimony of prosecuting attorney, who had written letter to defendant's family referring to defendant as a "troubled" and "very sick man," in support of insanity defense; availability and utilization of evidence from other sources, such as defense psychiatrist, indicated that there was neither compelling need for nor extraordinary circumstances requiring that testimony.

> [13] Criminal Law K> 539(1)
110 —
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k539 Admissibility
> 110k539(1) In General.
It is exception to hearsay rule to introduce in evidence testimony that was adduced at former trial.

> [14] Criminal Law K> 541
110 —
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k540 Grounds for Admission of Former Testimony
> 110k541 In General.
"Former testimony" exception to hearsay rule requires movant to prove that testimony given at formal judicial proceeding was given under oath, that party against whom former testimony is offered had opportunity to cross-examine witness at former proceeding, and that witness is presently unavailable.
> [15] Criminal Law K> 543(1)
110 —
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k540 Grounds for Admission of Former Testimony
110k543 Absence of Witness
> 110k543(1) In General.
Admission or exclusion of former testimony of unavailable witness is matter committed to discretion of trial court.

> [16] Criminal Law K> 1159.5

110 —
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
> 110k1159.5
Particular Issues or Elements.
Insanity defense decision will be disturbed only if evidence is without conflict and leads to conclusion contrary to conclusion of trier of fact.

> [17] Sentencing and Punishment K> 1625
350H —
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
> 350Hk1625 Aggravating or Mitigating Circumstances.

(Formerly > 203k351, > 110k1206.1(2))
Death penalty statute is not unconstitutional because it permits intentional killing in course of burglary to be employed as aggravating circumstance in case where burglary and murder also are charged as independent offenses.

> [18] Sentencing and Punishment K> 1676
350H —
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
> 350Hk1676 Planning, Premeditation, and Calculation.

(Formerly > 203k357(3))
Elements of lying in wait aggravating circumstance warranting imposition of death penalty include watching, waiting, and concealment from the person killed. > West's A.I.C. 35-50-2-9(b)(3).

> [19] Criminal Law K> 1159.2(10)
110 —
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
> 110k1159.2(10) Particular Offenses and Prosecutions.

Standard rule of appellate review, also applicable in death penalty case, involves consideration of only probative evidence and reasonable inferences supporting verdict without weighing evidence or assessing witness credibility; evidence is sufficient if reasonable trier of fact could conclude that defendant was guilty beyond a reasonable doubt.

> [20] Sentencing and Punishment K> 1772
350H —
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
> 350Hk1772 Sufficiency.

(Formerly > 203k357(3))
Lying in wait aggravator in murder prosecution was supported by evidence that defendant used circuitous approach toward victim's house in order to conceal himself from her and by testimony regarding amount of time involved, which tended to prove that defendant waited and watched until he could take victim by surprise, and by evidence regarding defendant's use of deadly weapon indicative of defendant's intent to kill. > West's A.I.C. 35-50-2-9(b)(3).

> [21] Sentencing and Punishment K> 1788(5)
350H —
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
> 350Hk1788(5) Scope of Review.

(Formerly > 110k1134(3))
In review, Supreme Court determines whether death penalty is appropriate to defendant and circumstances of his crime.

> [22] Sentencing and Punishment K> 1653
350H —
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
> 350Hk1653 Mitigating Circumstances in General.

(Formerly > 110k1208.1(5))
While defendant has right to offer evidence of mitigating circumstances he feels are present, trial court is under no obligation to find that mitigators exist, in imposing death penalty sentence.

> [23] Sentencing and Punishment K> 1788(9)
350H —
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
> 350Hk1788(9) Questions of Fact.

(Formerly > 110k1158(1))
Supreme Court will not reverse death penalty sentence for failure to find mitigator unless evidence leads only to conclusion opposite to the one reached by trial court.

> [24] Sentencing and Punishment K> 1668
350H —
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1666 Nature or Degree of Offense
> 350Hk1668 Murder.

(Formerly > 203k358(1))
Trial court and jury fully considered aggravators and mitigators in reaching death penalty sentence in murder prosecution.

Scott L. King, Appellate Public Defender, Crown Point, for appellant.

Linley E. Pearson, Atty. Gen. of Indiana and Arthur Thaddeus Perry, Deputy Public Defender, Indianapolis, for appellee.

GIVAN, Justice.

A jury trial resulted in the conviction of appellant of Murder and Burglary. The jury recommended the death penalty. On May 11, 1990, the trial court sentenced appellant to death.

The facts are: On March 4, 1989, appellant was given an eight-hour pass from the
Correctional Industrial Complex in Pendleton, Indiana where he was an inmate. Appellant was serving a sentence for Battery and Confinement in connection with a previous assault on his ex-wife, Lisa Bianco, who was the victim in this case. The pass authorized a trip to Indianapolis; however, appellant drove to St. Joseph County. Appellant went to the house of a friend, Rob Snider, where he changed clothes and removed an unloaded shotgun from the house without the knowledge of those present.

Appellant then drove to Mishawaka. He parked his car not far from Bianco's house and broke in through the back door. Bianco ran from her home, pursued by appellant. Neighbors witnessed the chase that ensued.

When appellant caught Bianco, he beat her with the shotgun which broke into pieces. One neighbor confronted appellant and saw him get into a car and drive away. Appellant surrendered to a policeman later that afternoon. The autopsy showed that Bianco died as a result of trauma to the head from a blunt instrument.

> [1] Appellant contends the trial court erred in refusing his tendered instruction on voluntary manslaughter. The test applied on review of the trial court's decision to give or refuse a tendered instruction is: 1) whether the tendered instruction correctly states the law; 2) whether there was evidence in the record to support the giving of the instruction; and 3) whether the substance of the tendered instruction was covered by other instructions which were given. > Reinbold v. State (1990), Ind., 555 N.E.2d 463.

Appellant claims there is evidence in the record indicating that he acted in sudden heat which would support the giving of the instruction. Appellant points to testimony that he was angry at the time of Bianco's death and made growling noises at his daughter when he broke into Bianco's house.

> [2]> [3] Killing in the sudden heat of passion is the element that distinguishes voluntary manslaughter from murder, but there must be sufficient provocation to induce such passion to render the defendant incapable of cool reflection. > Fox v. State (1987), Ind., 506 N.E.2d 1090. Therefore, the evidence of anger alone does not

support giving the instruction on voluntary manslaughter. Additionally, words alone cannot constitute sufficient provocation to give rise to a finding of sudden heat warranting an instruction on voluntary manslaughter. > Perigo v. State, (1989), Ind., 541 N.E.2d 936.

> [4] The existence of sudden heat is determined by the trier of fact, and the defendant has the burden of showing its existence. > Storey v. State (1990), Ind., 552 N.E.2d 477. There is some evidence in the record that appellant was angry at the time of Bianco's death. However, there was no evidence to indicate that Bianco provoked appellant either by words or actions. There is no evidence from which the jury logically could find sudden heat.

Appellant relies on > Reinbold, supra, for the proposition that a murder charge may never be drafted to preclude the giving of a voluntary manslaughter instruction. Appellant further relies upon > Gilley v. State (1990), Ind., 560 N.E.2d 522, for the proposition that giving a voluntary manslaughter instruction as a lesser-included offense of murder is proper even where there is no evidence of sudden heat. Appellant argues, therefore, that the trial court's refusal to give his tendered instruction on voluntary manslaughter, even in the absence of proof of sudden heat, was error.

> [5] We held in > Reinbold that a murder charge cannot be drafted so as to preclude the possibility of a conviction on voluntary manslaughter upon the introduction of evidence that the defendant acted in sudden heat and upon the acceptance of that evidence by the jury. > Reinbold, supra at 467.

In > Gilley, both murder and voluntary manslaughter charges were brought against that defendant. No evidence of sudden heat was presented, and the jury
was instructed on both murder and voluntary manslaughter. The jury convicted the defendant of voluntary manslaughter. We held that the State was not required to establish sudden heat in order to sustain a conviction for voluntary manslaughter. > Gilley, supra at 523.

> [6]> [7] Therefore, under > Reinbold and > Gilley, if the defendant meets his burden of proving sudden heat, the State may not preclude the giving of the voluntary manslaughter instruction. In the absence of evidence of sudden heat, it is the State's prerogative to elect which charge to proceed with against a defendant. Absolute discretion rests in the State to determine the crimes with which a defendant will be charged. > Compton v. State (1984), Ind., 465 N.E.2d 711.

> [8] The insanity defense also was raised in the present case. We have held that a trial court does not err when it refuses to instruct the jury as to a lesser-included offense in a prosecution for murder where the defense of insanity is used to disprove intent to commit the greater offense, and thus would not be compatible with the inference of guilt of a lesser-included offense. > Rowe v. State (1989), Ind., 539 N.E.2d 474.

Prior to trial, appellant's counsel discovered a letter dated January 20, 1989, written by Michael Barnes, prosecuting attorney for St. Joseph County, to appellant's family regarding appellant. In the letter, Barnes referred to appellant as a "troubled" and "very sick [original emphasis] man."

Appellant made a pretrial motion to call Barnes as a witness for the defense. The trial court denied this motion at a pretrial hearing. Appellant renewed his motion at trial which, again, was denied. Appellant then moved to admit a portion of the transcript of the pretrial hearing and the letter under the theory that the transcript was prior recorded testimony which authenticated the letter. The trial court denied this motion as well. Appellant claims the trial court's denial of these motions violated his right to present favorable evidence as guaranteed by the compulsory process clause of the Sixth Amendment made applicable to state criminal prosecutions by way of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Appellant notes that he relied upon an insanity defense at trial. He cites > Haggard v. State (1989), Ind., 537 N.E.2d 28, for the proposition that lay witnesses are competent to testify on the issue of sanity. He argues that the trial court denied him due process by not compelling Barnes to testify.

> [9]> [10]> [11] Ordinarily, counsel is not subject to being called as a witness. > Chatman v. State (1975), 263 Ind. 531, 334 N.E.2d 673. There are exceptions, such as when counsel is believed to have material information that cannot be disclosed otherwise. > Id. As a general rule, a prosecuting attorney cannot be called as a defense witness unless the testimony sought is required by compelling and legitimate need. > U.S. v. Dempsey (N.D.Ill.1990), 740 F.Supp. 1295; > U.S. v. LaRouche (D.Mass.1988), 695 F.Supp. 1290. The trial court in its discretion may deny the request if the prosecutor does not have information vital to the case. > U.S. v. Troutman (1987), 814 F.2d 1428. Where the evidence is easily available from other sources and absent "extraordinary circumstances" or "compelling reasons," an attorney who participates in a case should not be called as a witness. > U.S. v. Dack (1984), 747 F.2d 1172.

Appellant claims that Barnes' testimony would have helped prove the insanity defense. However, Barnes testified at the pretrial hearing that at the time he wrote the letter, he had not formed an opinion as to appellant's mental condition. If he were compelled to testify regarding his characterization of appellant as being "sick," he would state that appellant was not remorseful or regretful of his actions leading to his arrest for Battery and Confinement.
Regarding appellant's mental condition, he would have testified that appellant was sane. Barnes stated that he was "fed up" with appellant's family bringing what he felt were meritless claims concerning items believed to be wrongfully in Bianco's possession prior to the killing, and that this frustration precipitated the writing of the letter.

> [12] The trial court did not abuse its discretion by refusing to compel the testimony of the prosecuting attorney where evidence from other sources, such as the defense psychiatrist, was available and utilized by the defense to present the insanity defense. The availability of such evidence indicates that there was neither a compelling need nor extraordinary circumstances for the testimony.

Appellant also contends that he should have been able to introduce at trial Barnes' testimony at the pretrial hearing under the prior recorded testimony exception to the hearsay rule. Appellant argues that Barnes' former testimony would have authenticated the letter which appellant could have introduced in evidence. The trial court denied appellant's request to introduce the former testimony.

> [13]> [14]> [15] It is an exception to the hearsay rule to introduce in evidence testimony that was adduced at a former trial. > Schwartz v. State (1978), 177 Ind.App. 258, 379 N.E.2d 480. The "former testimony" exception to the hearsay rule requires the movant to prove that the testimony given at a formal judicial proceeding: (1) was given under oath; (2) that the party against whom the former testimony is offered had an opportunity to cross-examine the witness at the former proceeding, and (3) that the witness is presently unavailable. > Pollard v. State (1979), 270 Ind. 599, 388 N.E.2d 496. Admission or exclusion of former testimony of an unavailable witness is a matter committed to the discretion of the trial court. > Id.

The decision whether to require Barnes' testimony was not based upon availability. The trial court found no compelling need for his testimony. In light of the former testimony given in explanation of the phrasing in the letter, it is reasonable to conclude that the trial court did not find the letter or Barnes' testimony to be relevant to the defense's presentation of an insanity defense. The letter was written with regard to appellant's conduct and demeanor before the killing occurred.

To allow the former testimony at trial would circumvent the rule requiring a showing of compelling need for the live testimony.

> [16] The question of appellant's ability to comprehend right and wrong at the time of the killing was put squarely before the jury and its decision will not be disturbed. > Miller v. State (1988), Ind., 518 N.E.2d 794. An insanity defense decision will be disturbed only if evidence is without conflict and leads to a conclusion contrary to the conclusion of the trier of fact. > Wood v. State (1987), Ind., 512 N.E.2d 1094.

Appellant claims that application of the death penalty statute to the facts of this case was inappropriate and unconstitutional. He claims that committing murder during burglary cannot be used as an aggravating circumstance to support a capital charge where the felony intended in the commission of the burglary was murder. Appellant contends the aggravating circumstance alleged is unconstitutional in that it fails to provide a meaningful basis for distinguishing capital from non-capital homicides. Appellant claims the General Assembly could not have intended for the burglary aggravator to apply in a situation such as in the case at bar.

Appellant argues the application of the aggravating circumstance to this case is inappropriate in that the aggravator, the burglary, serves to trigger the application of the death penalty statute. Appellant argues that the aggravator should be applicable in this case only if appellant had formed an intent to commit burglary and then later formed a separate intent to commit murder. Appellant argues that when
the killing is "part and parcel of the underlying felony" the only factor distinguishing it, as a capital as opposed to a non-capital offense, is the site of the killing, and that is an improper basis for distinction.

We held in > Judy v. State (1981), 275 Ind. 145, 416 N.E.2d 95, that the circumstances of the killing constituted a valid aggravating factor warranting a recommendation of the death penalty. In that case, the defendant was convicted of four counts of murder. One of the statutory circumstances that the jury found in order to reach a death penalty recommendation was that the defendant had intentionally killed one of the victims while committing or attempting to commit a rape. In the > Judy case, as well as in the case at bar, it was the manner in which the murder occurred which warranted application of the death penalty statute.

The General Assembly could reasonably have determined that a murder committed by breaking and entering a dwelling in the place where a person should be able to feel secure, merited the death penalty.

> [17] We have held, in a case presenting a similar issue, that the death penalty statute was not unconstitutional because it permits an intentional killing in the course of a burglary to be employed as an aggravating circumstance in a case where burglary and murder also are charged as independent offenses. > Fleenor v. State (1987), Ind., 514 N.E.2d 80,cert. denied, > 488 U.S. 872, 109 S.Ct. 189, 102 L.Ed.2d 158. In > Fleenor, we held that the double punishment problem could be resolved by eliminating the sentence for the burglary conviction. > Id. Such was done in the case at bar.

Next, appellant argues that the evidence is insufficient to support the trial court's finding that appellant killed Bianco by lying in wait.

> [18] Lying in wait is an aggravating circumstance warranting the imposition of the death penalty. > Ind.Code § 35-50-2-9(b)(3). We have held that the elements of lying in wait include watching, waiting, and concealment from the person killed. > Davis v. State (1985), Ind., 477 N.E.2d 889, cert. denied, > 474 U.S. 1014, 106 S.Ct. 546, 88 L.Ed.2d 475.

> [19] We have held that our standard rules of appellate review apply in death penalty cases. > Games v. State (1989), Ind., 535 N.E.2d 530, cert. denied, > 493 U.S. 874, 110 S.Ct. 205, 107 L.Ed.2d 158, reh'g denied, > 493 U.S. 985, 110 S.Ct. 523, 107 L.Ed.2d 523. The standard rule of review involves a consideration of only the probative evidence and reasonable inferences supporting the verdict without weighing the evidence or assessing witness credibility. > Braswell v. State (1990), Ind., 550 N.E.2d 1280. The evidence is sufficient if a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt. > Id.

> [20] An examination of the evidence most favorable to the State shows that there was sufficient evidence upon which to find that the lying in wait aggravator was proven. There was testimony which indicated that once appellant arrived in St. Joseph County from Pendleton on the day of the killing, he dropped his mother at her home at about 1:00 p.m. There was further testimony that appellant's brother recalled arriving at Rob Snider's home at about 1:05 p.m., and that appellant left Snider's home at about 1:20 p.m. Snider testified that he recalled that appellant left Snider's house at 2:00 p.m.

There was evidence indicating that the distance from Snider's house to Lisa Bianco's house was 9.7 miles and that the drive to Mishawaka from Snider's house took approximately fifteen to twenty minutes. Police first were dispatched to Bianco's house at 3:09 p.m.

The jury had before it evidence that appellant parked the car he was driving in the parking lot of the credit union next to an alley, two houses away from Bianco's house, despite the fact there were no parked cars in the area of Bianco's residence.

Footprints were found going from the credit union to Bianco's back yard. The alley was muddy, and the shoes appellant was wearing at the time of his arrest also were muddy.

Bianco's back yard was isolated and secluded by dense bushes along the perimeter. The yard is obscured by branches, a large wooden gate, and the garage. Bianco's daughter heard glass breaking and then saw appellant holding what she described as a black bar.

It would be reasonable for the trier of fact to conclude that appellant had used a circuitous approach toward Bianco's house in order to conceal himself from her and that testimony regarding the amount of time involved tended to prove that appellant waited and watched until he could take Bianco by surprise. The evidence regarding his use of a deadly weapon was indicative of his intent to kill. The evidence was sufficient to support the finding that this aggravating factor was proven beyond a reasonable doubt.

> [21] Appellant argues that the death penalty is inappropriate in this case. In review, we determine whether the death penalty is appropriate to the defendant and the circumstances of his crime. > Coleman v. State (1990), Ind., 558 N.E.2d 1059.

Appellant's first contention is that the trial court failed to find the mitigating circumstance that appellant was under the influence of extreme mental and emotional disturbance at the time of the murder; therefore, that factor was not properly weighed.

Appellant further argues that his ability to conform his conduct to the requirements of law was impaired by his mental disease. However, the defense psychiatrist offered a diseased-mind diagnosis which was rejected by the jury. The facts show that appellant is intelligent and manipulative.

The manner in which appellant prepared for killing Bianco, the way in which he approached Bianco's house, and then carried out the plan indicate that he was not extremely mentally and emotionally disturbed at the time of the murder. Further, appellant had expressed repeatedly an intention to kill Bianco and had tried to solicit others to do so. This evidence supports the trial court's finding that this mitigating circumstance was not present.

Appellant's final argument against imposition of the death penalty is that his character and the nature of the offense do not warrant such a sentence. The evidence presented indicates that appellant failed to accept responsibility for his actions and that he attempted to shift responsibility to others. Appellant refuses to accept instruction or correction. The nature of this case involves domestic violence so brutal that to find, as appellant argues now, that but for his relationship with Bianco, he lived a life of normalcy, would denigrate the seriousness of this offense.

> [22]> [23]> [24] While appellant has a right to offer evidence of mitigating circumstances he feels are present, the trial court is under no obligation to find that the mitigators exist. > Lowery v. State (1989), Ind., 547 N.E.2d 1046, cert. denied, > 498 U.S. 881, 111 S.Ct. 217, 112 L.Ed.2d 176. We will not reverse a death penalty sentence for failure to find a mitigator unless the evidence leads only to a conclusion opposite to the one reached by the trial court. Id. We find that the aggravators and mitigators were fully considered by the trial court and jury in reaching the death penalty sentence.

The trial court is affirmed.

DICKSON and KRAHULIK, JJ., concur.

SHEPARD, C.J., concurs in result.

DeBRULER, J., concurs and dissents with separate opinion.

DeBRULER, Justice, concurring and dissenting.

In this case, I would affirm the convictions, but set aside the penalty of death as
inappropriate to appellant and his crime. To so vote is not to excuse or to justify, but to apply the intent of the sentencing law.

The State pleaded and undertook to prove two aggravators warranting the death penalty: 1) intentional killing while committing a burglary, (current version at > I.C.35-50-2-9(b)(1)(B)); and 2) murder by lying in wait, > I.C.35-50-2-9(b)(3).

I can accept the first of these aggravators despite the fact that the specific criminal intent alleged in support of the burglary element of the aggravator is the intent to kill, the same intent alleged in support of the intentional killing element of the aggravator. The crime of burglary involves essentially an interference with the lawful possession and occupation of property. > Bradley v. State (1964), 244 Ind. 630, 195 N.E.2d 347. It is separate and distinct in law from the intended felony, should it be committed; and sufficiently separate in time and space to serve as a means for identifying the sub class of intentional killings for which the death penalty may be appropriate. However, where the intent of the burglary is the intent to kill, the weight of the aggravator is greatly diminished, for the mind has formed but a single felonious intent. One who breaks and enters with the intent to steal, who, when upon being confronted by a resident chooses to kill in order to achieve the stealing or to avoid detection by authorities, is more culpable than appellant. Moreover, this would not be a capital case at all, if appellant had first met the victim in the yard and the crime had occurred at that point.

I cannot, however, accept the second of these alleged aggravators in this case. In > Thacker v. State (1990), Ind., 556 N.E.2d 1315, 1325, this Court held:

We therefore construe this statutory aggravator as intending to identify as deserving consideration for the penalty of death those who engage in conduct constituting watching, waiting and concealment with the intent to kill, and then choosing to participate in the ambush upon arrival of the intended victim.

Here, appellant, with a shotgun in hand, parked his car in a lot down the alley from the house. He walked up the alley, entered the backyard through a gate, went to the back door, broke it in, immediately confronted his ex-wife, and pointed the gun at her. She told her to daughters to run and call the police. They did run to a neighbor's house and immediately called police. She escaped from the house with him in chase, and he then struck her repeatedly, using the gun as a club, killing her. He left the scene, but soon gave himself up. There is no basis here to find a murder by lying in wait.

The trial court found no mitigating circumstances. I find this contrary to the record, fairly viewed. I give mitigating value to appellant's conduct in turning himself in to police. In so doing, appellant removed himself as a threat to the police and to others. This is an appropriate circumstance for consideration. > I.C.35-50-2-9(c)(8). I give mitigating value to the evidence as it shows that Matheney acted under the influence of extreme mental and emotional disturbance at the time of the murder. > I.C.35-50-2-9(c)(2). Appellant, in his relations with neighbors, fellow workers, his children and the children of others was helpful, useful, generous and kind. At the same time he was violent and abusive to his wife, the victim, and spent the entire year of 1986 receiving professional help. In 1986, appellant was professionally diagnosed as suffering from a mental disease, schizophreniform disorder. In 1987 he pleaded guilty to

battery of his wife and was committed to prison for that, and for removing his two children to Canada in violation of a custody order. 700 days in prison passed without contact with her, before he killed her in March of 1989, while on leave from prison.

During this time in prison, he was persistently motivated from within to write mail and file a host of documents, pleadings and complaints, the thrust of which were to claim that he was the victim of a conspiracy between his ex-wife, the prosecutor,
and others. His paranoid focus came to rest upon some tapes of telephone conversations in her possession. During the trial for her murder, three psychiatrists testified with respect to appellant's condition in 1989 at the time of the killing. Of the three, one was of the opinion that appellant then suffered from a paranoid disorder constituting a mental disease or defect; the others were of the contrary opinion. By the time of the crime, appellant had long been obsessed with the idea that he was being wronged by his wife. When confronting her after breaking in the house, he ignored the two children who were present, even as they left the house to call for help, on instruction from their mother. At that time he prodded her with the gun and, according to one of the children he was "growling." The evidence shows that the gun was unloaded when stolen by appellant, and that the owner had no ammunition for it, and that appellant did not discharge it during the crime. Indeed, there is no evidence at all that the gun was loaded at any time during the crime, or even that appellant had any ammunition to fit it.

In reviewing this sentence, I am unable to declare that there is a difference between the weight of the lone aggravating circumstance and that of the several mitigating ones. The extreme penalty is therefore not, in my opinion, appropriate.

EXHIBIT B

> 688 N.E.2d 883

Supreme Court of Indiana.

Alan L. MATHENEY, Appellant (Petitioner Below),
v.
STATE of Indiana, Appellee (Respondent Below).
No. 45S00-9207-PD-584.
Nov. 24, 1997.
Rehearing Denied March 31, 1998.

Convictions for murder and burglary, and resulting death sentence, were affirmed on appeal, > 583 N.E.2d 1202, and petitioner sought post-conviction relief. The Lake Superior Court, Richard J. Conroy, J., denied petition, and petitioner appealed. The Supreme Court, Shepard, C.J., held that: (1) petitioner's mental state did not make him unable to proceed with post-conviction proceedings; (2) postconviction court did not clearly err in denying petitioner's motion to disclose names of jurors at his original trial; (3) as applied in current proceedings, Lake County Magistrate Act did not encroach on power of judiciary in violation of State Constitution; (4) petitioner failed to show that magistrate was biased or engaged in improper ex parte communications; (5) trial and appellate counsel were not ineffective in strategy as to mental illness claims, in failing to object to various jury instructions, or in failing to challenge death penalty statute on constitutional and other grounds; (6) evidence that sentencing court may have relied on presentence psychological questionnaire, without providing defense counsel a copy of it, warranted Supreme Court's independent review of death sentence; and (7) aggravating circumstances outweighed mitigating circumstances, thus supporting imposition of death penalty.

Affirmed.

Boehm, J., filed concurring opinion.

West Headnotes

> [1] Criminal Law K> 1433(2)
110 —
110XXX Post-Conviction Relief

110XXX(A) In General
110k1433 Matters Already Adjudicated
> 110k1433(2) Affirmance of Conviction.

(Formerly > 110k998(2))
Post-conviction procedures do not afford the convicted an opportunity for a "super appeal," but, rather, they create narrower remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in post-conviction rules. Post Conviction Rule 1 et seq.

> [2] Criminal Law K> 1158(1)
110 —
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158 In General
> 110k1158(1) In General.
When appealing negative judgment of post-conviction court, petitioners must show that evidence, when taken as whole, leads unerringly and unmistakably to conclusion opposite to that reached by trial court, and, if evidence does not unswervingly point in that direction, decision of post-conviction court will stand. Post Conviction Rule 1 et seq.

> [3] Constitutional Law K> 268.2(2)
92 —
92XII Due Process of Law
92k256 Criminal Prosecutions
92k268.2 Disadvantaged Persons, Counsel and Trial
> 92k268.2(2) Incompetents or Psychopaths; Determination of Sanity.

[See headnote text below]

> [3] Mental Health K> 432
257A —
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
> 257Ak432 Mental Disorder at Time of Trial.
Even assuming petitioner's competence to assist counsel in post-conviction proceedings was subject to same due process

requirements as at trial, petitioner's mental state did not make him unable to proceed with post-conviction proceedings, despite his alleged refusal to cooperate with counsel's strategy decisions due to his delusional belief of organized, systematic conspiracy against him; petitioner understood legal strategy and nature of proceedings against him, and his attorneys were able to converse with him and provide adequate post-conviction review of conviction and sentence. > U.S.C.A. Const.Amend. 14.

> [4] Criminal Law K> 625.15
110 —
110XX Trial
110XX(A) Preliminary Proceedings
110k623 Separate Trial or Hearing on Issue of Insanity, Incapacity, or Incompetency
> 110k625.15 Evidence.
Trier of fact is not required to believe expert testimony on defendant's mental status.

> [5] Jury K> 76
230 —
230IV Summoning, Attendance, Discharge, and Compensation
> 230k76 Term of Service.
Postconviction court did not clearly err in denying petitioner's motion to disclose names of jurors at his original trial to enable him to investigate possibility of juror misconduct, since petitioner had access to other reasonable means of discovering hints of misconduct without requested order of disclosure; petitioner's counsel had access to name of jury foreperson, as part of trial record, and counsel had conversed with her regarding any possibility of jury tampering or receipt of extraneous information by its members, but found no evidence of misconduct.

> [6] Jury K> 76
230 —
230IV Summoning, Attendance, Discharge, and Compensation
> 230k76 Term of Service.
While impermissible harm can accrue to defendants when juries are improperly influenced by extraneous information, protection of jurors' interests in privacy and repose requires petitioner, in seeking post-conviction relief, to demonstrate some hint of a problem before granting of motion to disclose jurors' names.

> [7] Constitutional Law K> 56
92 —
92III Distribution of Governmental Powers and Functions
92III(A) Legislative Powers and Delegation Thereof
92k51 Encroachment on Judiciary
> 92k56 Establishment, Organization, and Jurisdiction of Courts.

[See headnote text below]

> [7] Criminal Law K> 1404
110 —
110XXX Post-Conviction Relief
110XXX(A) In General
110k1401 Constitutional, Statutory, and Regulatory Provisions
> 110k1404 Validity.

(Formerly > 110k978)
As it operated in postconviction proceedings, Lake County Magistrate Act did not encroach on power of judiciary in violation of State Constitutional provisions governing separation of powers and judicial power and jurisdiction; magistrates were not appointed by legislature or governor, but by judiciary, and their appointment was not mandated, and relevant statutes merely allowed magistrate to conduct preliminary proceedings and hearing as gatherer of facts, but reserved issuance of final appealable order to trial judge. > West's A.I.C. Const. Art. 3, § 1; > Art. 7, §§ 1, > 4; > West's A.I.C. 33-5-29.5-7.1, > 33-5-29.5-7.2.

> [8] Criminal Law K> 1650
110 —
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
> 110k1650 In General.

(Formerly > 110k998(18))
Magistrate's remarks regarding petitioner's motion for stay of postconviction proceedings on ground that petitioner was incompetent, by which magistrate indicated frustration at failure of petitioner's counsel to disclose factual basis for claim of incompetence, did not indicate prejudgment of motion or show

bias against petitioner, but, rather, showed understandable irritation with motion that requested hearing but declined to disclose facts on which judge might base decision to grant or deny request.

> [9] Criminal Law K> 1650
110 —
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
> 110k1650 In General.

(Formerly > 110k998(18))
Magistrate appointed in postconviction proceedings did not engage in improper ex parte communication with potential witness in violation of Code of Judicial Conduct, where magistrate was approached by prosecutor who inquired about subpoena she received from petitioner's counsel regarding her presence in magistrate's chambers when he allegedly made "injudicious" remarks about motion
filed by petitioner; magistrate did not seek out contact with witness against petitioner, and he immediately made both parties aware of what prosecutor had said to him. > Code of Jud.Conduct, Canon 3, subd. B(8).

> [10] Criminal Law K> 1650
110 —
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
> 110k1650 In General.

(Formerly > 110k998(18))
Petitioner could not reasonably perceive magistrate appointed in postconviction proceedings as biased merely because magistrate learned of motion which petitioner's counsel was about to file against him before it was actually filed, when magistrate was contacted by prosecutor who had been served with subpoena related to that motion. > Code of Jud.Conduct, Canon 3, subd. B(8).

> [11] Criminal Law K> 1650
110 —

110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
> 110k1650 In General.

(Formerly > 110k998(18))
Petitioner did not demonstrate bias against death penalty litigants by magistrate appointed in postconviction proceedings, based on comments made by magistrate at beginning of postconviction hearing, and previously to other judges, regarding apparent ease with which allegations of judicial bias and prejudice were made in postconviction petitions generally.

> [12] Judges K> 49(2)
227 —
227IV Disqualification to Act
227k49 Bias and Prejudice
> 227k49(2) Statements and Expressions of Opinion by Judge.
Articulation of observations by one judge to fellow judges concerning what the former perceives to be a trend on part of defendants or post-conviction petitioners does not indicate bias.

> [13] Criminal Law K> 1650
110 —
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
> 110k1650 In General.

(Formerly > 110k998(18))
Petitioner did not demonstrate bias or prejudice by magistrate in postconviction proceedings, based on petitioner's contention that magistrate misled his counsel regarding briefing requirements and then ruled many of his ineffective assistance of counsel claims waived for failure to provide cogent argument or to plead specific facts in support of allegations of error; inadequate post-conviction brief resulted either from misunderstanding on part of petitioner's lawyers or miscommunication on magistrate's part, rather than malicious plot by magistrate.

> [14] Criminal Law K> 1440(3)
110 —

110XXX Post-Conviction Relief
110XXX(A) In General
110k1435 Consideration Despite Waiver or Other Bar
110k1440 Counsel
> 110k1440(3) Same or Different Counsel in Previous Proceedings.

(Formerly > 110k998(3))
Normally, failure to challenge trial counsel's ineffectiveness on direct appeal constitutes its waiver from post-conviction consideration, but, when same attorney represents defendant both at trial and on appeal and does not raise on appeal the issue of trial counsel ineffectiveness, Supreme Court has been reluctant to apply waiver so as to forever foreclose appellant from raising question of competency of trial counsel. > U.S.C.A. Const.Amend. 6.

> [15] Criminal Law K> 641.13(2.1)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(2.1) In General.
Trial counsel did not perform below professional norms and were not ineffective in strategy as to mental illness claims in capital murder prosecution, despite petitioner's contention that counsel pursued insanity defense at guilt phase on which they had no hope of success, while failing to adequately present readily available mitigating evidence during penalty phase; there was no available defense that would have cast doubt on fact that petitioner intentionally killed victim, and employing insanity defense permitted introduction of otherwise inadmissible evidence. > U.S.C.A. Const.Amend. 6.

> [16] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems

> 110k641.13(7) Post-Trial Procedure and Review.
Petitioner failed to show prejudice necessary to succeed on claim that trial counsel rendered ineffective assistance in penalty phase of murder trial by failing to solicit psychiatrist's explicit opinion that petitioner's illness prevented him from conforming his behavior to requirements of the law; counsel did elicit related testimony from psychiatrist at guilt phase, jury was informed about "inability to conform" mitigator and that it could consider guilt phase evidence during penalty phase, and evidence generally did not support inability to conform mitigator. > U.S.C.A. Const.Amend. 6.

> [17] Criminal Law K> 641.13(5)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(5) Pretrial Proceedings; Sanity Hearing.
Trial counsel were not ineffective for failing to follow up their request for determination of competency with formal motion for hearing on murder defendant's competency, since appointed psychiatrists did not find presence of mental disease or defect in pretrial examinations, and, while trial counsel believed defendant to be mentally ill, they did not believe it prevented him from understanding proceedings or from assisting in his own defense. > U.S.C.A. Const.Amend. 6; > West's A.I.C. 35-36-3-1(a).

> [18] Criminal Law K> 641.13(5)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(5) Pretrial Proceedings; Sanity Hearing.
When making ineffectiveness claim based upon attorney's failure to request competency hearing, appellate or postconviction petitioner must cross performance and prejudice hurdles of > Strickland standard for ineffective assistance claims. > U.S.C.A. Const.Amend. 6; > West's A.I.C. 35-36-3-1(a).

> [19] Criminal Law K> 1030(1)
110 —
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
> 110k1030(1) In General.
"Fundamental error" is error so grave that it must be addressed on appeal regardless of whether issue was otherwise properly "preserved."
> [20] Criminal Law K> 1042
110 —
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
> 110k1042 Sentence or Judgment.
Postconviction petitioner waived claim that appellate counsel was ineffective for not raising issue of prosecutorial misconduct, where petitioner did not raise that particular claim among the other appellate counsel ineffectiveness claims in his petition for postconviction relief. > U.S.C.A. Const.Amend. 6.

> [21] Criminal Law K> 1043(1)
110 —
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1043 Scope and Effect of Objection
> 110k1043(1) In General.
Non-committal phrasing in petition for postconviction relief, stating that petitioner was denied effective assistance of counsel by numerous acts and omissions of appellate counsel, including but not limited to those specified in petition,
was insufficient to preserve every conceivable claim of appellate counsel ineffective assistance not mentioned in petition. > U.S.C.A. Const.Amend. 6.

> [22] Criminal Law K> 641.13(7)
110 —

110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Murder defendant's trial counsel did not perform below prevailing professional norms, as required for ineffective assistance claim, in failing to preserve objections to jury instructions regarding defendant's burden of proving insanity by preponderance of evidence, since statute imposing such burden on defendant had been found constitutional by Indiana Supreme Court and United States Supreme Court. > U.S.C.A. Const.Amend. 6; > West's A.I.C. 35-41-4-1(b).

> [23] Criminal Law K> 641.13(2.1)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(2.1) In General.
Trial counsel's performance was not deficient, as required for ineffective assistance claim, in failing to object to jury instruction regarding defendant's right not to testify and stating that defendant was competent witness to testify in his own behalf, despite defendant's contention that term "competent" implied individual who was sane and free of mental illness, and conflicted with claim of mental illness that was central to his defense and sentence. > U.S.C.A. Const.Amend. 6.

> [24] Criminal Law K> 641.13(2.1)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(2.1) In General.
Murder defendant could not establish any prejudice from trial counsel's alleged ineffective assistance in failing to object to jury

instruction regarding defendant's right not to testify and stating that defendant was competent witness to testify in his own behalf; even if defendant were correct in his contention that term "competent" implied individual who was sane and free of mental illness, his mental illness defense went to his sanity at time he committed charged act, and the most the instruction would have done was cause jury to think defendant "sane" at time of trial. > U.S.C.A. Const.Amend. 6.

> [25] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
In light of binding precedent holding that sympathy should not influence jury's recommendation regarding death penalty, murder defendant's trial counsel was not ineffective in failing to argue that guilt phase instruction which prohibited jury from considering sympathy for defendant when reaching verdict, combined with jury's instruction to consider all guilt phase evidence at sentencing phase, amounted to mandate upon jury not to consider sympathy at sentencing phase. > U.S.C.A. Const.Amend. 6.

> [26] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Trial counsel was not ineffective in failing to object to jury instruction defining "lying in wait" death penalty aggravator, since instruction given was correct statement of Indiana law, and caselaw definitions of "lying in wait" gave the phrase sufficient specificity to survive vagueness challenge; with respect to aggravator's ability to narrow class of death-eligible murderers, no reasonable lawyer would think it necessary to challenge aggravator

on its face or as applied, given relevant Supreme Court precedent. > U.S.C.A. Const.Amend. 6; > West's A.I.C. 35-50-2-9(b)(3).

> [27] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Given dispositive Supreme Court precedent contrary to defendant's position, trial counsel was not ineffective in murder trial in failing to challenge penalty phase jury instruction containing all statutory mitigators, based on defendant's contention that, by including irrelevant mitigators, instruction prejudiced defendant by trivializing evidence that he did present and possibly encouraging jury to view absence of one of listed mitigators as aggravating circumstance in and of itself. > U.S.C.A. Const.Amend. 6.

> [28] Homicide K> 311
203 —
203VIII Trial
203VIII(C) Instructions
> 203k311 Punishment.
Jury instruction given in penalty phase of murder prosecution, stating that mitigating circumstances that "may be" considered were "as follows," was correct statement of the law and would not cause jury to misunderstand its duty to consider mitigation, and thus counsel was not ineffective for failing to challenge instruction on that basis; use of term "may" did not go to consideration of mitigation generally, but to notion that jury was permitted to consider any one or more of listed mitigating factors, and jury was separately instructed on duty to consider mitigating circumstances. > U.S.C.A. Const.Amend. 6.

> [29] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation

110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Murder defendant's trial and appellate counsel were not ineffective for failing to challenge trial court's instruction of jury to consider all guilt phase evidence at penalty phase, given Supreme Court precedent approving the incorporation of all trial evidence for penalty phase consideration. >U.S.C.A. Const.Amend. 6.

> [30] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Murder defendant's counsel was not ineffective for failing to object to penalty phase final instructions on ground that they failed to state that jury did not need to find mitigating factor unanimously in order to consider it, given dispositive Supreme Court precedent contrary to defendant's position. > U.S.C.A. Const.Amend. 6.

> [31] Homicide K> 311
203 —
203VIII Trial
203VIII(C) Instructions
> 203k311 Punishment.

[See headnote text below]

> [31] Sentencing and Punishment K> 1771
350H —
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
> 350Hk1771 Degree of Proof.

(Formerly > 203k358(1))

[See headnote text below]

> [31] Sentencing and Punishment K> 1780(3)

350H —
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
> 350Hk1780(3) Instructions.

(Formerly > 203k358(1))
Although "preponderance of the evidence" was appropriate standard for determining mitigating
circumstances, and instruction to that effect would have been appropriate in penalty phase of capital murder prosecution, absence of instruction so stating, without more, did not necessarily suggest to jurors that mitigating circumstances had to be proven beyond reasonable doubt.

> [32] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
In prosecution for murder and burglary, trial counsel was not ineffective in failing to request instruction on penalty for burglary, or attendant instructions regarding consecutive sentences and aggravated terms, despite defendant's contention that penalty phase final instruction was incomplete and misleading by only setting forth penalty for murder in event death penalty were not imposed; instruction given was correct statement of law at time of trial, and attorney could reasonably desire not to remind jury deliberating death sentence that defendant was found guilty of another serious felony in addition to murder. > U.S.C.A. Const.Amend. 6.

> [33] Criminal Law K> 641.13(2.1)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems

> 110k641.13(2.1) In General.
Trial and appellate counsel could not have been ineffective for failing to make claim based upon holding in United States Supreme Court case that was decided more than two years after petitioner's case was decided on direct appeal, and four years after his trial. > U.S.C.A. Const.Amend. 6.

> [34] Constitutional Law K> 268(11)
92 —
92XII Due Process of Law
92k256 Criminal Prosecutions
92k268 Trial
92k268(2) Particular Cases and Problems
> 92k268(11) Instructions.

[See headnote text below]

> [34] Sentencing and Punishment K> 1780(3)
350H —
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
> 350Hk1780(3) Instructions.

(Formerly > 110k796)
United States Supreme Court has not held that due process requires jury to be correctly instructed about sentencing alternatives available in lieu of death sentence, or that jury's fear of defendant "getting out" after term of years inherently influences jury's death sentence deliberation. > U.S.C.A. Const.Amend. 14.

> [35] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Terms "presumptive penalty" and "credit for good behavior," as used in penalty phase jury instruction regarding possible sentence

for murder if death penalty was not imposed, were not such technical terms of art that layman could not understand them, and thus defendant's counsel were not deficient for failing to request clarification of those terms, and defendant could not show any prejudice so as to undermine confidence in outcome of his trial. > U.S.C.A. Const.Amend. 6.

> [36] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Given United States Supreme Court's reference to death-qualified juries as "impartial," murder defendant's counsel was not ineffective for failing to mount facial challenge to death penalty statute based on defendant's contention that death-qualified juries were more likely to vote for conviction than non-death qualified juries, and that statute violated state and federal constitutional right to impartial jury by subjecting defendants to "death-qualified" jury without first having neutral fact-finder determine probable cause for death eligibility in adversarial proceeding. > U.S.C.A. Const.Amend. 6; > West's A.I.C. Const. Art. 1, § 13; > West's A.I.C. 35-50-2-9(a).

> [37] Sentencing and Punishment K> 1795
350H —
350HVIII The Death Penalty
350HVIII(H) Execution of Sentence of Death
> 350Hk1795 In General.

(Formerly > 110k1130(5))
By failing to allege any facts tending to show that prosecutor in petitioner's case used his power to achieve purportedly impermissible ends, petitioner waived ineffective assistance claim alleging that counsel was ineffective in failing to argue that death penalty statute was unconstitutional "as applied" by allowing impermissible use of prosecutorial discretion in impaneling death-qualified juries. > U.S.C.A. Const.Amend. 6; > West's A.I.C.

Const. Art. 1,§ 13; > West's A.I.C. 35-50-2-9(a); Rules App.Proc., Rule 8.3(A)(7).

> [38] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Murder defendant's trial counsel was not ineffective in failing to mount vagueness challenge to felony/murder aggravator in death penalty statute, since, other than defendant's bald assertion that phrase "while committing or attempting to commit" specified felonies was vague, he provided no evidence or argument as to how person of ordinary intelligence would fail understand its meaning. > U.S.C.A. Const.Amends. 6, > 14; > West's A.I.C. Const. Art. 1,§ 12; > West's A.I.C. 35-50-2-9(b)(1).

> [39] Criminal Law K> 641.13(2.1)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(2.1) In General.
Petitioner's trial counsel was not ineffective for failing to make claim that petitioner lacked standing to make. > U.S.C.A. Const.Amend. 6.

> [40] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Murder defendant's trial counsel was not ineffective in failing to challenge felony/murder aggravator in death penalty statute on

ground that aggravator was "overbroad" to extent that majority of homicides were committed in conjunction with another crime, since such argument did not come within ambit of overbreadth doctrine. > U.S.C.A. Const.Amends. 6, > 14; > West's A.I.C. Const. Art. 1, § 12; > West's A.I.C. 35-50-2-9(b)(1).

> [41] Constitutional Law K> 82(4)
92 —
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
> 92k82(4) Vagueness and Overbreadth in Restriction.
Overbreadth is constitutional doctrine primarily applied in First Amendment context, designed to protect innocent persons from having legitimate exercise of their constitutionally protected freedoms fall within ambit of statute written more broadly than needed to proscribe illegitimate and unprotected conduct. > U.S.C.A. Const.Amend. 1.

> [42] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Petitioner's trial counsel was not ineffective in failing to argue that felony/murder aggravator in death penalty statute failed to meaningfully narrow class of murderers eligible for death penalty because majority of homicides were committed in conjunction with another crime; petitioner provided no authority for his factual assertion that majority of homicides were committed in conjunction with other crimes, and, even assuming truth of that assertion, it had no specific relevance to felony/murder aggravator, which limited aggravating circumstance to the commission of certain enumerated felonies. > U.S.C.A. Const.Amend. 6; > West's A.I.C. 35-50-2-9(b)(1).

> [43] Criminal Law K> 641.13(7)
110 —
110XX Trial

110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Because defendant's sentencer clearly considered only valid aggravators, defense counsel was not ineffective for failing to argue that statute setting out aggravating circumstances justifying imposition of death penalty violated state and federal constitutional prohibitions against cruel and unusual punishment by failing to state specifically that only charged aggravators could be considered; jury instructions clearly informed jury that it could only consider charged, statutory aggravators, and trial court specifically mentioned only the charged aggravators in its sentencing statement. > U.S.C.A. Const.Amends. 8, > 14; > West's A.I.C. Const. Art. 1, § 16; > West's A.I.C. 35-50-2-9(b).

> [44] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Defense counsel was not ineffective for failing to argue that, by using term "may," statute specifying mitigating circumstances to consider in penalty phase of capital trial made consideration of mitigating evidence optional, thus violating Eighth and Fourteenth Amendments; term "may" meant simply that any one of listed mitigators, including "catch-all" provision, were permissible for consideration. > U.S.C.A. Const.Amends. 8, > 14; > West's A.I.C. 35-50-2-9(c).

> [45] Sentencing and Punishment K> 1795
350H —
350HVIII The Death Penalty
350HVIII(H) Execution of Sentence of Death
> 350Hk1795 In General.

(Formerly > 110k1130(5))

Petitioner's ineffective assistance claim was waived for failure to present any cogent argument in support of it, where petitioner claimed that counsel should have argued that death penalty statute set up barriers to consideration of mitigating evidence by failing to specify that only prerequisite to considering mitigating evidence is its relevance to defendant's character, record, or circumstances of crime, but he provided no insight into why absence of such specification would prevent sentencer from considering otherwise relevant mitigating evidence. > U.S.C.A. Const.Amend. 6; > West's A.I.C. 35-50-2-9(c).

> [46] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Given ordinary understanding of word "mitigating," and breadth of Supreme Court's prior definition of "mitigating circumstances" as including virtually anything favorable to accused, defense counsel was not ineffective in failing to challenge death penalty statute on ground that it failed to provide adequate definition of "mitigation." > U.S.C.A. Const.Amend. 6; > West's A.I.C. 35-50-2-9(c).

> [47] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Absent any reason to assume that juries would make such a logical leap in understanding death penalty statute, defense counsel was not ineffective for failing to mount constitutional challenge to statutory mitigating circumstance "no significant history of prior criminal conduct" on ground that adjective "significant" created unacceptable risk that sentencer would view defendant's record in terms of aggravation only, thereby converting absence of mitigator

into an aggravator. > U.S.C.A. Const.Amend. 6; > West's A.I.C. 35-50-2-9(c)(1).

> [48] Criminal Law K> 641.13(7)
110 —
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
> 110k641.13(7) Post-Trial Procedure and Review.
Defense counsel was not ineffective for failing to challenge constitutionality of death penalty statute, on ground that statutory mitigator for perpetrator under the age of 18 considered only chronological age; defendant provided no support for his contention that emotional and intellectual age were more accurate indicators of culpability, and evidence of intellectual and emotional age could be introduced and argued under "catch-all" mitigator in any event. > U.S.C.A. Const.Amend.6; > West's A.I.C. 35-50-2-9(c)(7).

> [49] Constitutional Law K> 70.1(10)
92 —
92III Distribution of Governmental Powers and Functions
92III(B) Judicial Powers and Functions
92k70 Encroachment on Legislature
92k70.1 In General
92k70.1(7) Particular Subjects, Application to
> 92k70.1(10) Crimes.
Sentencing factors which assess capital murder defendant's degree of "culpability" are for legislature, not judiciary, to determine, and, unless statutorily created aggravating circumstance violates some constitutional right of defendant, reviewing court is not proper forum for determining what aggravating circumstances are or are not "appropriate." > West's A.I.C. 35-50-2-9.

> [50] Sentencing and Punishment K> 1795
350H —
350HVIII The Death Penalty
350HVIII(H) Execution of Sentence of Death
> 350Hk1795 In General.

(Formerly > 203k345, > 203k343)
Evidence that sentencing court failed to provide defense counsel with presentence questionnaire on which court allegedly relied in sentencing petitioner to death did not require remand to postconviction court, but, rather, Supreme Court would independently review proper aggravating and mitigating circumstances absent psychological questionnaire at issue, and determine whether death sentence was appropriate, thereby mooting petitioner's claims surrounding questionnaire.

> [51] Sentencing and Punishment K> 1676
350H —
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
> 350Hk1676 Planning, Premeditation, and Calculation.

(Formerly > 203k357(4))

[See headnote text below]

> [51] Sentencing and Punishment K> 1681
350H —
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
> 350Hk1681 Killing While Committing Other Offense or in Course of Criminal Conduct.

(Formerly > 203k357(4), > 203k357(7))

[See headnote text below]

> [51] Sentencing and Punishment K> 1709
350H —
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
> 350Hk1709 Mental Illness or Disorder.

(Formerly > 203k357(4))
Aggravating circumstances outweighed mitigating circumstances, thus supporting imposition of death penalty; charged aggravating circumstances of killing by "lying in wait," and killing while committing or attempting to commit burglary, were established by

circumstances surrounding defendant's breaking into ex-wife's home and killing her
while he was on eight-hour pass from correctional facility, and, while defendant was extremely angry with victim and may have suffered from mental disease, anger did not dominate his actions, and mental illness did not prevent him from conforming his conduct to requirements of the law. > West's A.I.C. 35-50-2-9(b, c).

Susan K. Carpenter, Public Defender, J. Jeffreys Merryman, Jr., Steven H. Schutte, Deputy Public Defenders, Indianapolis, for Appellant.

Jeffrey A. Modisett, Attorney General, Arthur Thaddeus Perry, Deputy Attorney General, Indianapolis, for Appellee.

SHEPARD, Chief Justice.

Alan L. Matheney filed a petition for post-conviction relief challenging his conviction and death sentence for the murder of his former wife. Judge Richard J. Conroy denied Matheney's petition, and Matheney appeals. We affirm.

I. Case History

A jury found that in March 1989 Matheney murdered his ex-wife, Lisa Bianco, while on an eight-hour pass from the Correctional Industrial Complex in Pendleton, Indiana, where he was serving a sentence for battery and confinement in connection with a previous assault on Bianco. Following the jury's recommendation, the court sentenced Matheney to death. This Court affirmed Matheney's conviction and sentence. > Matheney v. State, 583 N.E.2d 1202 (Ind.1992). This post-conviction proceeding ensued.

II. Burdens in Post-Conviction Relief

> [1]> [2] Post-conviction procedures do not afford the convicted an opportunity for a "super appeal." Rather, they create a narrower remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules. > Weatherford v. State,

619 N.E.2d 915 (Ind.1993). Petitioners bear the burden of establishing their grounds by a preponderance of the evidence. Ind.Post-Conviction Rule 1, § 5; > Weatherford, 619 N.E.2d at 917. When appealing the negative judgment of a post-conviction court, petitioners must show that the evidence, when taken as a whole, "leads unerringly and unmistakably to a conclusion opposite to that reached by the trial court." > Weatherford, 619 N.E.2d at 917; > Lowe v. State, 455 N.E.2d 1126 (Ind.1983). If the evidence does not unswervingly point in that direction, the decision of the post-conviction court will stand.

III. Due Process Claims

Matheney claims that he was denied a full and fair hearing at the post-conviction court because of Matheney's inability to rationally consult with and assist his post-conviction counsel, the court's refusal to provide the names of the jurors at Matheney's original trial so he could investigate the possibility of juror misconduct, the unconstitutionality of the Lake County Magistrate Act which empowered the magistrate who presided in his case, and bias and prejudice on the part of the magistrate hearing the case.

A. Competency to Proceed with Post-Conviction Petition

> [3] Matheney's counsel argue that mental illness prevented Matheney from rationally consulting with them, thus depriving him of a fair post-conviction proceeding. Matheney's counsel filed a motion to stay the post-conviction proceedings due to incompetence, and received an opportunity to testify ex parte, with the agreement of the State, as to why they believed Matheney incompetent. After their testimony, the magistrate asked questions of Matheney. He then recessed the hearing to consult with Judge Conroy on the issue of Matheney's competence, and returned with a decision to deny the motion to stay the proceedings. (P.C.R. at 1359-61.)

Counsel presses two arguments on this front: first, whether or not the facts show Matheney "incompetent," or unable to assist his counsel in the preparation of his case and to understand the nature of the post-conviction proceedings; and second, even if he is "incompetent," whether "competence," as that term is understood

in cases addressing a defendant's due process rights at trial, see, e.g., > Cooper v. Oklahoma, 517 U.S. 348, 352-356, 116 S.Ct. 1373, 1376-77, 134 L.Ed.2d 498 (1996), applies to post-conviction proceedings. The post-conviction court found against Matheney on both issues. Because we conclude that Matheney's mental state did not make him unable to proceed, we affirm the trial court's factual finding about competence. We therefore leave for another day the Attorney General's plausible contention that a post-conviction petitioner need only be able to assist counsel sufficiently to permit performance adequate under > Baum v. State, 533 N.E.2d 1200 (Ind.1989) (holding that postconviction proceedings are not subject to Sixth Amendment or > Article I, section 13 guarantees).

The record shows that Matheney believes there to be an organized, systematic conspiracy designed to persecute him, originally spearheaded by his now deceased ex-wife and the prosecutor who tried his criminal battery case. According to his attorneys, Matheney believes this alleged conspiracy to be the only issue relevant to his case, and he will not cooperate with them if he does not find his attorneys' actions or strategic decisions relevant to exposing this conspiracy against him. His counsel and a psychiatrist for the defense claim that Matheney's belief results from a mental disease which causes him to see the world only through a deluded version of reality, namely the conspiracy.

Our review of the record causes us to agree with the post-conviction court's ruling on Matheney's competency. First, Matheney was able to understand the nature of the proceedings against him. Magistrate Page stated,

The repeated pro se criticisms of the attorneys, the courts, and the rulings on the admissibility of evidence, all are in themselves sufficient to support the conclusion that the petitioner has always had a very clear understanding of the nature of the proceedings even if he did not agree with others' opinions of what should be presented in those proceedings.

(P.C.R. at 935-36.) The following colloquy between the magistrate and Matheney supports the court's assessment of Matheney's ability to understand legal strategy and the nature of the proceedings in which he found himself:

Q. Mr. Matheney, do you know who I am?

....

A. Magistrate Page.

Q. And do you know what my function is here?

A. Today you are presiding over this post conviction hearing....

Q. What is a post conviction hearing?

A. The attack of the legalities of your conviction, whether it was legal or illegal, to bring up issues that you feel that a defendant has a right to a new trial or sentence relief or whatever.

....

Q. Your attorneys have filed a Petition for Post Conviction Relief, in which numerous grounds are alleged. Have you had an occasion to read this petition?

A. I read it a couple of times, and I just paid attention to the grounds that pertained to me. There's a lot of stuff in there, statutorily, that they put in everybody's death penalty; and I didn't pay too much attention to, because they've already been ruled on over and over again.

Q. And the doctor said that you felt or seemed to indicate or give the impression that you felt that these issues were frivolous, because the only issue you feel is relevant is the one about [the alleged conspiracy between your wife and the prosecuting attorney at your trial] or this--

A. No. There's a lot of issues in there that I agree with. The only ones that I didn't agree with were the ones that they keep putting in everybody's issue, that the Supreme Court keeps turning down.

....

Q. Well, the general challenges to the death penalty itself?

A. Right, yes.

Q. You feel that those are a waste of time because of the previous rulings of the Supreme Court?

A. Yeah. When I discussed them, they said, well, you never know when you're going to get a new Supreme Court; but a new Supreme Court don't come along often enough in this decade.

Q. Does that seem unreasonable for them to take that position? Have you not seen cases where a court will rule the same way over and over again; and then all of a sudden, along comes the same question and they say, well, now that we think about it, we've changed our mind?

A. Yeah, I've seen cases like that. I just felt that there could have been more issues investigated and put in this than what was.

Q. Your attorneys have suggested that the failure to include additional grounds are a result of you specifically instructing others not to cooperate. Is that the fact of the matter?

A. I believe during this whole thing that they want to investigate my childhood. Well, that has absolutely nothing--what I repeatedly told them, over and over again, is that what you should concentrate on is what had taken place, you know, the death of Lisa Bianco, and what caused it; and we should concentrate on investigating this particular, you know, period of time. Going back to my childhood 30 or 40 years ago, to me, doesn't seem like it's--you know, it's a waste of time, a waste of valuable time. I think time could be better spent on investigating things about the incident itself.

Q. You may not be alone in thinking that. I understand; that argument has been made before.

A. And I also--from what I've read, the courts don't--well, I know the state courts don't put a whole lot of weight on stuff that's, as mitigators, on things that happened 30 or 40 years ago, in my opinion.

(P.C.R. at 1336, 1341-44.) Matheney's responses to the magistrate indicate a clear understanding of the posture of his case and what strategies he and his attorneys sought to employ.

Second, while Matheney may not have cooperated with his lawyers when he disagreed with some of their strategies and may have
been an extremely difficult client, they were able to converse with him and provide an adequate post-conviction review of his conviction and sentence. For instance, counsel claims that Matheney would not cooperate in their attempts to ask him questions about his background for purposes of developing potential mitigating evidence. Matheney's uncooperativeness did not arise from an inability to comprehend the situation or a desire to thwart the attempts of his attorneys at every turn. Rather, based upon his review of case law regarding this type of mitigation evidence, Matheney viewed his attorneys' attempts to investigate his childhood as an inefficient use of his attorneys' already limited time and resources. (See P.C.R. at 1343-44.)

Also, Matheney's counsel were able to do background research, although they admittedly had a more difficult time than usual in doing so. The following colloquy is illustrative of the situation not being as impossible as counsel suggests:

MR. MERRYMAN: He will not specifically tell us who his friends are, who his associates--with a few exceptions--who his associates are, who we can talk to, to develop his background.

THE COURT: Did you speak with those associates?

MR. MERRYMAN: We spoke with some of them.

THE COURT: Did they tell you who his other associates were?

MR. MERRYMAN: Mr. Matheney didn't--

THE COURT: Yes or no?

MR. MERRYMAN: They told us who they--the other associates were that they knew of.

THE COURT: Okay. Did you speak with, then, those other associates?

MR. MERRYMAN: This was a very small group of people.

....

MR. SCHUTTE: ... [Matheney's] illness prevents [him] either from discussing with us what his childhood was like or from giving his family the freedom they need to discuss it with us.

Now, I will suggest to you his family has been--I will represent to you that I have discussed--I have interviewed his family on numerous occasions. Prior to or following each of those discussions, Mr. Matheney has notified them that under no circumstances are they to communicate with me anymore; because all I'm trying to do, in his view, is the same old thing.

THE COURT: Have they honored those requests?

MR. SCHUTTE: They are under a great burden. I think, frankly, they have been less candid with me than they would like to be....

(P.C.R. at 1326-27; 1331-32.) While the client may be a very important source of information in counsel's investigation of a capital case, the client is not the only source, especially during the lengthy post-conviction process.

> [4] Given the evidence from Dr. Berkson that Matheney was previously competent to stand trial, > (FN1) (P.C.R. at 2150-51), the evidence available to the post-conviction court about Matheney's present mental state, and the deference we give to a trier of fact's determination of a defendant's or a petitioner's competency, > (FN2) we cannot say that the facts point unswervingly towards a result opposite the one reached by the post-conviction court.

B. Ability to Interview Jurors

> [5] Matheney moved the post-conviction court to order the jury commissioner to disclose the names of the jurors and alternates at Matheney's trial, so he could investigate whether the jury had been

exposed to any extraneous influences. The court denied Matheney's motion on the grounds that there had been no indication of any outside influences on the jury justifying such an order. The court reasoned that until a petitioner makes an initial showing of a reasonable belief that the jury might have been improperly influenced, the jurors' interests in privacy and repose outweigh a petitioner's interest in uncovering possible improper influences on a jury. (P.C.R. at 1218-19.)

> [6] While impermissible harm can accrue to defendants when juries are improperly influenced by extraneous information, see, e.g., > Wilson v. State, 511 N.E.2d 1014 (Ind.1987), we agree with the post-conviction court that protection of the jurors' interests in privacy and repose is ample reason to require some hint of a problem before granting a motion to disclose the jurors' names. Cf. > Stinson v. State, 262 Ind. 189, 313 N.E.2d 699 (Ind.1974) (affirming denial of request to set aside the jury's verdict supported by juror affidavits claiming impermissible irregularities in deliberation, because an opposite ruling would lead to juror harassment by both sides of litigation resulting in an "unconscionable burden upon citizens who serve on juries").

Matheney's counsel had access to the name of the jury foreperson, as it was a part of the trial court's record. (P.C.R. at 1219.) Indeed, counsel conversed with her regarding any possibility of jury tampering or the receipt of extraneous information by its members and found no evidence of misconduct. (P.C.R. at 1220.) Thus, Matheney had access to other reasonable means of discovering hints of misconduct without the requested order of disclosure. The trial court's ruling was not clearly erroneous.

C. The Lake County Magistrate Act

> [7] Matheney claims that > Indiana Code § 33-5-29.5-7.1, -7.2 (West 1996), which creates the position that Magistrate Page occupied in this case, violates > Article III, Section 1; > (FN3) > Article VII, Section 1; > (FN4) and > Article VII, Section 4, > (FN5) of Indiana's Constitution. Matheney argues that because all judicial authority rests with the Supreme Court, the legislature cannot create the position of "magistrate" and confer judicial authority upon it. Only the Supreme Court, Matheney argues, has

the power to supervise the lower courts, and thus to create magisterial positions when the need arises therein.

These claims remind us of a dispute over legislative and judicial authority in the last century. In 1881 the Supreme Court's docket was overburdened with a backlog of cases two-years deep. To provide relief, the General Assembly passed an act which allowed the Court to appoint five commissioners for two year terms "under such rules and regulations as the Court shall adopt, to aid and assist the Court in the performance of its duties." Act of April 14, 1881, > § 1, 1881 Ind. Acts 92, 92; 1 Leander J. Monks, Courts and Lawyers of Indiana 298-99 (1916). The Supreme Court assigned cases to the commissioners, but had final approval over each opinion. Monks, supra, at 299. This arrangement was renewed for another two years in 1883, Act of March 3, 1883, > § 1, 1883 Ind. Acts 77, 77, and by 1885 the congestion of the docket was alleviated. See Monks, supra, at 299.

In 1889 the docket was again congested, and "for a second time an appeal was made
to the Legislature to provide some relief." Id. The legislature passed a bill nearly identical to the 1881 act, but with one important difference: the General Assembly, and not the Court, was to appoint the commissioners. Act of Feb. 22, 1889, > § 1, 1889 Ind. Acts 41, 41. The Supreme Court, finding that this modification violated > article III, section 1, and > article VII, section 1, of Indiana's Constitution, quickly declared the act unconstitutional. > State ex rel. Hovey v. Noble, 118 Ind. 350, 21 N.E. 244 (1889).

Magistrates such as Page are not appointed by the legislature or the governor, but by the judiciary, and their appointment is not even mandated, see > Ind.Code Ann. §§ 33-4-7-1, > 33-5-29.5-7.2 (West 1996), unlike the commissioners of the 1881 act. See Act of April 14, 1881, > § 1, 1881 Ind. Acts ch. 17, § 1, 92, 92. The provisions in the Indiana Code under which Magistrate Page acted merely allowed him to conduct the preliminary proceedings and hearing as a gatherer of facts, but did not allow him to issue a final appealable order. See > Ind.Code Ann. § 33-4-7-4, -7, -8 (West Supp.1992) (amended 1993). Only Judge Conroy could, and did, (see P.C.R. at 945), issue the final appealable order, and did not do so in an uninformed or cavalier manner. > (FN6) We find the

magistrate provisions at issue in this case reminiscent of the acceptable legislative assistance provided in the acts of 1881 and 1883, and not the encroachment on the judiciary found in the act of 1889. Accordingly, we hold the magistrate act constitutional as it operated in this case. > (FN7)

D. Magistrate Bias & Prejudice

> [8] Matheney claims that Magistrate T. Edward Page, to whom Judge Conroy referred the case for hearing, prejudged the facts and was therefore biased against him. He bases this allegation on certain comments made by the magistrate before the hearing. The first occurred in Magistrate Page's own office when he was meeting with Stephen Owens, a deputy public defender, and Kathleen Sullivan, a Lake County prosecutor, about a matter unrelated to Matheney's case. The magistrate's secretary handed him a motion that had just arrived via fax from Matheney's counsel requesting a stay of proceedings because Matheney was allegedly incompetent. Seeing the title of the motion, Magistrate Page stopped his conversation to read it, taking interest in the motion because of its nature and how close its arrival was to the hearing date. He stated that his interest peaked when he came to the affidavit of Dr. Jeffrey Smalldon, a psychologist who supported the motion's allegations. Among other things, Smalldon asserted:

My opinion that Mr. Matheney is not competent to assist his legal counsel is based on my assessment of his current mental status. Although there exists a factual basis for this opinion, I have been advised by Mr. Matheney's legal counsel not to disclose that basis for purposes of the current affidavit.

(P.C.R. at 279 (emphasis in original).)

"I think any judge faced with making a difficult decision would understand my immediate frustration," the magistrate later stated. "I looked up, and speaking to no one in particular, made the comment, 'I don't believe this,' something to that effect. 'They ask me to find him incompetent, but they don't tell me why.' " (P.C.R. at 1186.) Owens testified that Magistrate Page "said something like, 'I can't believe the arrogance of those people. They want me to find Matheney incompetent but they won't even tell me why they think that.' " (P.C.R. at 377.) > (FN8)

Magistrate Page's remarks show an understandable irritation with a motion that would readily frustrate any trier of fact, one which requests a hearing, but declines to disclose the facts on which the judge might base a decision to grant or deny that request. His remarks do not indicate a prejudgment of the motion, nor do they show bias against Matheney. > (FN9)

> [9]> [10] Matheney also claims that Magistrate Page engaged in ex parte communication with a potential witness. It appears that Kathleen Sullivan, after receiving a subpoena from Matheney's counsel regarding her presence in the magistrate's chambers when he allegedly made his "injudicious" remarks, reported to the magistrate that he had been accused of making injudicious remarks about death penalty post-conviction relief petitioners, Matheney in particular. If the magistrate replied in any way to Sullivan's statement, (compare P.C.R. at 1191 with P.C.R. at 1195), it was to ask her if the information she was sharing was privileged. Thereafter, Page immediately contacted both the State's attorney and Matheney's attorney, pursuant to a prescheduled conference call, and asked whether it was wise for them to continue to hold pretrial meetings without the presence of a court reporter, given what the magistrate had just learned about a potential motion from Matheney's counsel regarding previous out-of-court statements Page had allegedly made. It was at this time that Matheney's counsel informed Page about the contents of affidavits from England and Owens.

Matheney claims that this incident violated Indiana's Code of Judicial Conduct, which states, "A judge shall not initiate, permit, or consider ex parte communications made to the judge outside the presence of the parties, concerning a pending or impending proceeding...." > Ind.Judicial Conduct Canon 3(B)(8). We disagree. Magistrate Page did not seek out contact with a witness against Matheney. The "witness" in this instance merely shared with Page what she had heard about the nature of statements the magistrate, himself, had made. Matheney could not reasonably perceive Page as biased merely because the magistrate learned of a motion which Matheney's counsel was about to file against him before it was actually filed. Page immediately made both parties aware of what Sullivan had said to him. No appearance of impropriety or partiality arises from these facts. > (FN10)

> [11]> [12] Matheney also alleges that comments made by Magistrate Page at the beginning of the post-conviction hearing, and previously to other judges, show his bias against death penalty litigants in general. The specific statement by Page on which Matheney takes issue is as follows:

[A]llegations of judicial bias and prejudice are, next to accusing a judge of being
corrupt, are the most serious accusations you can make. They seem to be made casually in these petitions for post conviction relief regarding death penalty cases; and although I was assured by counsel last week, when the subject came up, that, oh, no, these are not routinely made and that they have only made it in this particular instance; and to their knowledge, they're not routinely made in death penalty cases. I find it interesting that in some discussions I had with judges at a conference last Friday, when they asked me how the hearing was going, and I mentioned how the hearing began with it being objected to, that I ought to disqualify myself because I was biased and prejudiced, to my being accused of being biased and prejudiced everytime [sic] I ruled on an objection against the petitioner.... The response from one judge who had handled death penalty PCRs before was, is that he had experienced the same thing. I have heard that from another judge, as well.

(P.C.R. at 1183-84.) We agree with Matheney's characterization of these statements as "mild comments," (Petitioner's Br. at 49). The articulation of observations by one judge to fellow judges concerning what the former perceives to be a trend on the part of defendants or post-conviction petitioners does not indicate bias.

> [13] Matheney also argues that Magistrate Page denied him a fair hearing by misleading his counsel regarding briefing requirements and then ruling many of his ineffective assistance of counsel claims waived because of either Matheney's failure to provide cogent argument or his failure to plead specific facts in support of his allegations of error. We have carefully reviewed the facts surrounding this final allegation of bias, finding that either a misunderstanding on the part of Matheney's lawyers or a miscommunication on the magistrate's part, rather than a malicious plot by the magistrate, led to Matheney's inadequate post-

conviction brief. We find no bias or prejudice against Matheney on the part of Magistrate Page.

IV. Ineffective Assistance of Counsel

A litigant who claims he was denied his Sixth Amendment right to effective assistance of counsel must satisfy the standard enunciated in > Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). > Douglas v. State, 663 N.E.2d 1153, 1154 (Ind.1996). Under > Strickland, a defendant must show that his attorney's performance "fell below an objective standard of reasonableness," > id. (citing > Strickland, 466 U.S. at 687-91, 104 S.Ct. at 2064-66) and "that this substandard performance deprived him of a fair trial," > id. (citing > Strickland, 466 U.S. at 691-96, 104 S.Ct. at 2066-69), as determined by whether "there is a reasonable probability that the result of the proceeding would have been different but for the defense counsel's inadequate representation," > Cook v. State, 675 N.E.2d 687, 692 (Ind.1996). Matheney's evidence on the two prongs of the > Strickland test must rebut a presumption that counsel's performance was adequate. > Butler v. State, 658 N.E.2d 72 (Ind.1995).

> [14] Matheney's claims concerning counsel pertain to both his trial > (FN11) and appellate representation, and they are legion. > (FN12) Judge Conroy found many of these issues waived for failure to provide cogent argument or
failure to plead sufficient facts in support of the allegations. At least some of these allegations are preserved. We have decided, in the interests of judicial economy and because there is a sufficiently developed record, to evaluate the ineffectiveness claim as a whole. Finding all of Matheney's ineffective assistance of counsel allegations unpersuasive, we hold that Matheney was not denied the effective assistance of counsel. Because we also find many of these claims meritless, we will only address some of his stronger arguments for illustration.

A. Use of Insanity Defense and Mitigating Evidence

> [15] Matheney claims his trial counsel pursued a defense during the guilt phase unsupported by the Matheney's mental health evidence, and did not adequately argue during the penalty phase the existence of a mitigating circumstance available from

Matheney's mental health evidence. Matheney's argument is summarized as follows. Dr. Morrison, a psychologist who had examined Matheney, was called to testify in support of Matheney's insanity defense. She testified that Matheney suffered from a paranoid personality disorder. To prove insanity, a defendant must show, among other things, that he could not appreciate the wrongfulness of his actions when he committed the crime. > Ind.Code § 35-41-3-6 (West 1986). Counsel never attempted to prove that Matheney did not appreciate the wrongfulness of his actions. In fact, Dr. Morrison testified as part of Matheney's post-conviction proceeding that she would have opined at trial that Matheney could appreciate the wrongfulness of his actions on the day of the crime. However, she also stated that in her opinion Matheney's illness prevented him from conforming his conduct to the requirements of the law. Such an inability is one of the listed mitigating factors in the death penalty statute. > Ind.Code § 35-50-2-9(c)(6) (West Supp.1996). Therefore, Matheney argues, counsel were ineffective for pursuing a defense at the guilt phase on which they had no hope of success, while failing to adequately present readily available mitigating evidence during the penalty phase.

While present counsel bemoan trial counsels' decision to pursue the insanity defense, they provide no evidence of what alternative strategy trial counsel should have employed in its stead. Indeed, there is much to indicate that employing this defense was the best alternative available. There was no available defense that would have cast doubt on the fact that he intentionally killed Lisa Bianco, and by employing the insanity defense, Matheney's attorneys were able to introduce evidence that they otherwise would not have been able to submit. (See P.C.R. at 1699 (indicating trial counsels' use of insanity defense to get Matheney's side of the story before the jury through the expert called to testify, while keeping Metheney himself off the witness stand)). We conclude counsel did not perform at a level below professional norms.

> [16] Matheney's penalty phase claim of ineffective assistance fails on the prejudice prong. In our opinion concerning Matheney's direct appeal, we addressed the "inability to conform" mitigator, noting evidence supporting the trial court's finding that this mitigator did not exist. > (FN13) Moreover, while trial counsel did not elicit the statement "Matheney's illness prevented him from conforming his behavior to the requirements of the law" from Dr.

Morrison, they did elicit testimony from her at the guilt phase which could support the presence of that mitigator. (See T.R. at 2724-32.) The trial court informed the jury about the "inability to conform"
mitigator, and told the jury it could consider evidence from the guilt phase during the penalty phase. Finally, trial counsel argued this mitigator while arguing to the jury, and to the judge, about sentencing. While eliciting Dr. Morrison's explicit opinion as to the presence of this mitigator during the penalty phase may have helped Matheney, given the testimony elicited from Dr. Morrison, trial counsel's closing argument, and the evidence cutting against the presence of that mitigator already mentioned in our previous opinion, we cannot say that the failure to elicit such testimony from Dr. Morrison creates "a reasonable probability that the result of the proceeding would have been different," > Cook, 675 N.E.2d at 692.

B. Failure to Notify the Court about Alleged Incompetency

> [17] Matheney argues that trial counsel were ineffective for failing to bring Matheney's alleged incompetence to the attention of the court. The post-conviction court found Matheney competent to have stood trial, and thus ruled that his counsel were not ineffective for failing to secure a formal hearing on Matheney's competency.

> [18] A defendant is not competent to stand trial when he is unable to understand the proceedings and assist in the preparation of his defense. > Ind.Code Ann. § 35-36-3-1(a) (West 1986). When making an ineffectiveness claim based upon an attorney's failure to request a competency hearing, an appellate or post-conviction petitioner must cross the performance and prejudice hurdles of the > Strickland standard. > Dodson v. State, 502 N.E.2d 1333 (Ind.1987). Matheney's claim does not overcome the first hurdle.

On March 14, 1989, Matheney's trial counsel filed a notice of insanity defense and requested examination by a psychiatrist for determining Matheney's competency to stand trial. On March 27 the trial court appointed Drs. Berkson and Batacan "for the purposes of determining [Matheney's] competency to stand trial and sanity." (T.R. at 7.) Dr. Batacan examined Matheney on April

12 and June 21, 1989, and Dr. Berkson examined Matheney on April 14, 1989. Neither found the presence of mental disease or defect. Dr. Berkson stated that during his examination Matheney had no difficulty responding promptly to his questions, organizing his thoughts, or putting his thoughts together in a logical, sequential order. Dr. Berkson also testified he had examined Matheney two years earlier in relation to a previous criminal matter and had found Matheney competent at that time.

While trial counsel believed Matheney to be mentally ill, they did not believe it prevented him from understanding the proceedings or from assisting in his own defense. Charles Lahey, one of Matheney's trial counsel, testified, "Despite his obsessive conduct, I didn't find [Matheney] that incapable of planning his own defense. In fact, he was actively planning it although it wasn't right in all regards." (P.C.R. at 1500.) When asked, "In your opinion did Mr. Matheney have a general idea of how the legal system operated and what he was being charged with and the gravity of the situation," Lahey replied, "Yes, I did think that he did." (P.C.R. at 1516.) Asked if he thought Matheney was competent to assist him with the defense, Lahey responded that while Matheney was of little help to them, he did not believe Matheney's lack of help was due to incompetence, as that term is legally understood. (See id. at 1542-43.) Philip Skodinski, another of Matheney's trial counsel, when asked if Matheney was competent to assist, replied, "I think he was.... He certainly understood what he was charged with or what evidence [sic] to find he was not guilty. In that regard I guess he was competent to assist in his own defense." (P.C.R. at 1734.)

Given the psychiatrists' determinations before trial, trial counsels' own opinions of Matheney's competency, and Dr. Berkson's earlier determination of Matheney's competency, trial counsel were not ineffective for failing to follow up their request for a determination of competency with a formal motion for a hearing on Matheney's competency. > (FN14)

C. Failure to Properly Preserve "Fundamental Errors"

> [19] Matheney claims that both his trial and appellate counsel were ineffective for failing "to properly preserve fundamental errors." > (FN15) (Petitioner's Br. at 87 (capitalization and emphasis excluded).) Specifically, Matheney alleges three errors:

first, that appellate counsel was ineffective for failing to argue prosecutorial misconduct on direct appeal; second, that trial counsel, one of whom was also appellate counsel, was ineffective for failing to preserve objections to various alleged errors in the jury instructions and then failing to allege them as fundamental error on appeal; and third, that trial and appellate counsel were ineffective for failing to preserve and/or raise particular claims pertaining to the unconstitutionality of Indiana's death penalty statute at trial and on direct appeal.

1. Prosecutorial Misconduct

> [20]> [21] Matheney claims his appellate counsel was ineffective for not raising the issue of prosecutorial misconduct. However, out of the multitude of appellate counsel ineffectiveness claims in his petition for post-conviction relief, Matheney never once makes this claim. > (FN16) The post-conviction court accordingly made no findings on it. (See P.C.R. at 230-45.) The Attorney General contends this issue is waived. The Attorney General is correct. > Canaan v. State, 683 N.E.2d 227, 235 (Ind.1997) ("[C]laims not advanced until appellant's brief in an appeal from the denial of post-conviction relief are waived.") > (FN17)

2. Jury Instructions

Matheney alleges that one of his trial counsel, who was also his appellate counsel, was ineffective for failing to preserve objections to various errors in the jury instructions and then failing to allege them as fundamental error on appeal. We address these alleged failings below.

> [22] (a) Burden of Proving Insanity. Matheney claims that various preliminary and guilt phase jury instructions, (see T.R. 577, 611, 620, 632), were erroneous because they placed on him the burden of proving insanity by a preponderance of the evidence. This burden is imposed by > Ind.Code Ann. § 35-41-4-1(b) (West 1986). This Court has found this burden constitutional, > Price v. State, 274 Ind. 479, 412 N.E.2d 783 (1980), and so has the U.S. Supreme Court, > Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). Thus, Matheney's counsel did not perform below "prevailing professional norms," > Strickland v.

Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984).

> [23] (b) Defendant as "Competent" Witness. Matheney claims trial counsel should have objected to what he says was an instruction commenting on his competence:

The defendant is a competent witness to testify in his own behalf. He may testify or not, as he may choose. In this case, the defendant has not testified. This fact is not to be considered by the jury as any evidence of guilt. The jury shall not comment upon, refer to, or in any manner
consider the fact that the defendant did not testify in arriving at your verdict in this case.

(T.R. at 630.) According to Matheney, "[i]n common usage, the term 'competent' implies an individual who is sane and free of mental illness." (Petitioner's Br. at 98.) Because the allegation of mental illness was central to his defense and sentence, Matheney argues that either his trial counsel was ineffective for failing to object to this instruction, or his appellate counsel was ineffective for failing to raise the issue on appeal.

> [24] The post-conviction court correctly interpreted the word in this instance as meaning "legally qualified." (P.C.R. at 914.) The definitions listed for "competent" in Webster's New International Dictionary imply no link to "sanity." Rather, meanings such as "possessed of sufficient aptitude," "possessed of skill needed to perform an indicated action," and "legally qualified in mental and physical makeup a [competent] witness" are listed. Webster's Third New International Dictionary 463-64 (1993). Matheney offers no basis for his assumption that a jury would understand "competent" to mean anything other than legally able. Moreover, Matheney's defense went to his sanity at the time he committed the act. Even if Matheney was correct, the most the instruction would have done was cause the jury to think Matheney "sane" at the time of trial. Thus, he has not shown any evidence of possible prejudice, or of deficient performance on the part of his counsel for not advancing this argument at trial or on appeal.

> [25] (c) Consideration of Sympathy. Matheney claims that a guilt phase jury instruction which prohibited the jury from

considering sympathy for Matheney when reaching a verdict, combined with the jury's instruction to consider all guilt phase evidence at the sentencing phase, amounted to a mandate upon the jury not to consider sympathy at the sentencing phase, absent a limiting instruction to the contrary. Matheney's counsel were not deficient for failing to make this argument, however, in light of our holding that sympathy should not influence a jury's recommendation. > Woods v. State, 547 N.E.2d 772 (Ind.1989), on reh., > 557 N.E.2d 1325 (1990), cert. denied, > 501 U.S. 1259, 111 S.Ct. 2911, 115 L.Ed.2d 1074 (1991).

> [26] (d) "Lying in Wait" Instruction. The trial court gave the following instruction to the jury:

"Lying in wait" requires watching, waiting, and concealment from the person killed with the intent to kill that person.

"Lying in wait" means taking the victim by surprise or ambush. The lying in wait need not last for any particular period of time provided that the length of time is sufficient to allow the defendant to form the intent to kill.

Concealment from the victim must be the direct means to attack or gain control of the victim. It is not necessary, however, that the defendant be concealed when the fatal acts are committed as long as the lethal attack begins and flows continuously from the moment the concealment and waiting ends.

(T.R. at 669; P.C.R. at 915.) This instruction is a correct statement of Indiana law. See > Davis v. State, 477 N.E.2d 889 (Ind.1985), cert. denied, > 474 U.S. 1014, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985). While "lying in wait" is not defined in the criminal code, this Court's definition of it in > Davis and subsequent cases gives the phrase sufficient specificity to survive a vagueness challenge. As for this aggravator's ability to narrow the class of death-eligible murderers, > Davis indicates that not all those convicted of murder would necessarily fall within this aggravator's definition. See > id. at 897 (finding insufficient evidence to support the trial court's finding of murder committed while lying in wait). No reasonable lawyer would think it necessary to challenge the lying in wait aggravator on its face or as applied in this case, given our cases dealing with this issue.

> [27] (e) Instruction Containing All Statutory Mitigators. Matheney claims that the trial court erred by giving penalty phase instruction six, which placed all eight statutory mitigators before the jury and did not instruct the jury that it must consider mitigation. Several of the mitigators were not relevant to the evidence presented in his
case. Therefore, Matheney argues, he was prejudiced by this instruction because it trivialized the evidence which he did present and possibly encouraged the jury to view the absence of one of the listed mitigators as an aggravating circumstance in and of itself. We have rejected this argument, > Miller v. State, 623 N.E.2d 403 (Ind.1993), and thus do not view Matheney's counsel were ineffective for not making it.

> [28] Matheney also asserts that the trial court erred in instructing the jury, "The mitigating circumstances that may be consider under this section are as follows," (T.R. at 670), claiming that the jury must consider mitigation. The "may" in the court's instruction does not go to the consideration of mitigation generally, but to the notion that the jury was permitted to consider any one or more of the following list, including the "catch-all" at the end. Given final instruction ten, which states, "You are to consider both aggravating and mitigating circumstances," (T.R. at 674), we have no reason to believe that the jury misunderstood the correct interpretation of "may" in instruction six. Because instruction six was a correct statement of the law, Matheney's counsel were not ineffective for failing to raise the arguments proffered here.

> [29] (f) Consideration of Guilt Phase Evidence at Penalty Phase. Matheney argues that either his trial or appellate counsel were ineffective for failing to challenge the trial court's instruction of the jury to consider all guilt phase evidence at the penalty phase. (See, e.g., id.) Because we have previously approved the incorporation of all the trial evidence for penalty phase consideration, see, e.g., > Smith v. State, 475 N.E.2d 1139 (Ind.1985), Matheney's counsel were not ineffective for failing to raise the argument advanced here.

> [30]> [31] (g) Unanimity and Burden of Proof for Mitigators. Matheney claims the penalty phase final instructions were inadequate in that: (1) they failed to state that the jury did not need

to find a mitigating factor unanimously in order to consider it; and (2) they failed to state that mitigating circumstances need only be proven by a preponderance.

As to Matheney's first contention, this Court has already resolved it against him. > Bivins v. State, 642 N.E.2d 928 (Ind.1994). Thus, Matheney's counsel were not ineffective for failing to make the argument proffered here.

As to Matheney's second contention, it is true that "preponderance of the evidence" is the appropriate standard for determining mitigating circumstances. > Id. at 950 (citing > Rouster v. State, 600 N.E.2d 1342, 1348 (Ind.1992)). An instruction to that effect would have been appropriate. Nevertheless, the absence of an instruction so stating, without more, does not necessarily suggest to jurors that mitigating circumstances need be proven beyond a reasonable doubt, as Matheney contends. Matheney's argument was questioned in > Miller v. State, 623 N.E.2d 403, 409-10 (Ind.1993), and we formally reject it today. As we noted in > Miller, "All instructions to a jury on reasonable doubt place that burden upon the State. There is no inference in any portion of a trial that a defendant's evidence comes under that scrutiny." > Id. at 409. Without something specific in the given jury instructions which would clearly lead a jury to such a misunderstanding, a bald assertion as to what a jury is likely to presume will not suffice.

> [32] (h) Penalty Phase Final Instruction Twelve. Matheney alleges that penalty phase final instruction twelve > (FN18) gave the jury incomplete and misleading information about the penalties available for Matheney if he was not sentenced to death. Specifically, Matheney argues that the court: (1) did not inform the jury of the available penalties for burglary; (2) did not define or explain "presumptive" or "credit time [sic] for good behavior"; (3) did not discuss or explain the possibility of consecutive sentences; and (4) did not discuss the grounds for imposing an aggravated term. Basing his claim on > Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), where Matheney claims to find a due process requirement that juries "be correctly instructed about the sentencing alternatives available in lieu of a death sentence," (Petitioner's Br. at 104), Matheney argues that this instruction and the stated omissions misled the jury by leaving them with "the

impression that, should the jury decline to impose death, Matheney could be released after serving fifteen years." (Petitioner's Br. at 104.) > (FN19)

> [33]> [34] The instruction was a correct statement of the law at the time of Matheney's trial. Counsel's failure to request instruction on the penalty for burglary, or the attendant instructions regarding consecutive sentences and aggravated terms, did not make them ineffective. An attorney may reasonably desire not to remind a jury deliberating a death sentence that the defendant was found guilty of another serious felony in addition to murder. Also, > Simmons was handed down more than two years after we decided Matheney's case on direct appeal, and four years after his trial. Because > Simmons was not available to Matheney's trial or appellate counsel, it cannot be said that either were ineffective for failing to make a claim based upon its holding, even if what Matheney claims to be > Simmons holding is correct. > (FN20)

> [35] Also, we cannot say that the terms "presumptive penalty" and "credit for good behavior" are such technical terms of art that a layman could not understand them. See > McNary v. State, 428 N.E.2d 1248, 1252 (Ind.1981). Therefore, Matheney's counsel were not deficient for failing to request clarification, nor has Matheney shown any prejudice so as to undermine confidence in the outcome of his trial.

3. Constitutionality of Indiana's Statute

Matheney alleges that his trial counsel were ineffective for failing to preserve numerous constitutional objections to the Indiana death penalty statute. Matheney concedes that we have rejected many of his constitutional challenges, (Petitioner's Br. at 106); counsel appear to offer them in contemplation of federal appeal, (see id.), though many of these have also been rejected in courts of the United States. For those constitutional challenges already decided adversely to Matheney's claims, this Court "does not choose to reassess its position at this time." > Daniels v. State, 528 N.E.2d 775, 783 (Ind.1988). Even if we did so choose, however, it would be highly unlikely that we would find prior counsel's performance substandard for failing to make these challenges, considering we have already spoken to the contrary concerning them. Accordingly, we will address here the alleged failings of prior

counsel as to constitutional challenges not already addressed adversely to Matheney by
this Court. > (FN21)

> [36] (a) Finding of Probable Cause for Capital Trial Eligibility. Matheney says counsel should have argued that > Indiana Code § 35-50-2-9(a) violates the United States > (FN22) and Indiana > (FN23) Constitutions facially and as applied because it allows a defendant to be subjected to a "death-qualified" jury without first having a neutral fact-finder determine, after an adversarial proceeding, probable cause for death eligibility. According to present counsel, studies show death-qualified juries to be more likely to vote for conviction than non-death qualified juries. Because prosecutors have discretion to seek the death penalty, Matheney argues that they can impermissibly use their discretion to impanel death-qualified juries just to increase their chances of securing a conviction in close cases or of having a jury which is more prosecution-oriented. > (FN24)

> [37] As Matheney concedes, however, the U.S. Supreme Court has held the use of "death-qualified" juries to be constitutional. > Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). In so doing, that court referred to death-qualified juries as "impartial." > Id. at 180, 106 S.Ct. at 1768. In light of this suggestion, Matheney's counsel was not ineffective for failing to claim otherwise. > (FN25)

> [38]> [39] (b) The "Felony/Murder" Aggravator. Matheney claims that the "felony/murder aggravator" in the death penalty statute violates the U.S. and Indiana Constitutions facially and as applied because it is vague, overbroad, and fails to narrow meaningfully the class of death-eligible murderers. > (FN26) > Indiana Code § 35-50-2-9(b)(1) provides:

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

> Ind.Code Ann. § 35-50-2-9(b)(1) (West Supp.1989) (amended 1993).

Matheney claims that the phrase "while committing or attempting to commit" is vague, violating > United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954) (stating that criminal codes must "give a person of ordinary intelligence fair notice
that his contemplated conduct is forbidden"). (Petitioner's Br. at 109). Other than this bald assertion, however, Matheney provides no evidence or argument as to how a person of ordinary intelligence would fail understand what it means. Without more, he offers little grounds for the claim that his attorneys were ineffective for failing to make this meritless claim.

> [40]> [41] Matheney also claims that > Ind.Code § 35-50-2-9(b)(1) is "overbroad," because "the majority of homicides are committed in conjunction with another crime. See > Broadrick v. Oklahoma, 413 U.S. 601, 612 [93 S.Ct. 2908, 2915-16, 37 L.Ed.2d 830] (1972)." (Petitioner's Br. at 109.) Matheney's overbreadth argument, however, is confused and misplaced. Overbreadth is a constitutional doctrine primarily applied in the First Amendment context. It is designed to protect innocent persons from having the legitimate exercise of their constitutionally protected freedoms fall within the ambit of a statute written more broadly than needed to proscribe illegitimate and unprotected conduct. See > Broadrick, 413 U.S. at 612, 93 S.Ct. at 2915-16; Laurence H. Tribe, American Constitutional Law § 12-27 (2nd ed.1988). Matheney makes no argument as to what legitimate conduct might possibly fall within the felony murder aggravator, nor could he.

> [42] Matheney also claims that > Indiana Code § 35-50-2-9(b)(1) violates > Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), by failing to narrow meaningfully the class of murderers eligible for the death penalty. Besides this assertion, the only argument Matheney makes is that "the majority of homicides are committed in conjunction with another crime." (Petitioner's Br. at 109.) Matheney's argument fails for at least two reasons. First, he provides no authority for his proposition that a majority of homicides are committed in conjunction with other crimes. We would be very reluctant to find a statute, which enters our courtroom "clothed with a presumption of constitutionality," >

Sidle v. Majors, 264 Ind. 206, 209, 341 N.E.2d 763, 766 (Ind.1976), unconstitutional on a single, unsupported assertion of fact. Second, even if it were true that a majority of homicides are committed in conjunction with another crime, this has no specific relevance to the aggravator at issue here, which does not make "the commission of any other crime" an aggravating circumstance, but only the commission of certain enumerated felonies. We are unable to find Matheney's original lawyers ineffective for failing to make this claim.

(c) The "Lying in Wait" Aggravator. Matheney argues that the lying in wait aggravator, > Ind.Code Ann. § 35-50-2-9(b)(3) (West Supp.1996), is facially vague, and vague and overbroad as applied. We begin by rejecting his overbreadth challenge here for the same reason we rejected it above pertaining to the felony murder aggravator. See supra part IV.C.3(b). Next we note that we have already rejected Matheney's ineffective assistance claim regarding a challenge to the jury instructions given regarding this aggravator. See supra part IV.C.2(d). For the reasons set forth there, we reject his repeated "as applied" challenges here.

Finally, Matheney challenges our interpretation of the lying in wait aggravator as applied in our direct appeal opinion of his case, arguing that under the language we used in summing up the facts in support of our affirmance, "the lying in wait aggravator could apply to virtually any intentional killing." (Petitioner's Br. at 111.) Actually, appellate counsel argued the meaning of this statute with sufficient persuasion that it drew a dissent on this very point. > Matheney, 583 N.E.2d at 1209 (DeBruler, J., concurring and dissenting). Counsel did not carry the day, but was hardly ineffective.

> [43] (d) Aggravation Contentions. Matheney claims that > Indiana Code § 35-50-2-9(b), which sets out the aggravating circumstances that justify the imposition of the death penalty in Indiana, violates the Eighth and Fourteenth Amendments of the U.S. Constitution, and Article One, Section Sixteen, of the Indiana Constitution. He says the statute fails to state specifically that only charged aggravators may be considered by the sentencer, thus allowing, by omission, the sentencer to consider uncharged and invalid aggravating circumstances.

In support of his federal constitutional claim, Matheney cites > Espinosa v. Florida, 505 U.S. 1079, 1081, 112 S.Ct. 2926, 2928, 120 L.Ed.2d 854 (1992) (per curiam). > Espinosa does state that "the weighing of an invalid aggravating circumstance violates the Eighth Amendment," > id. (citations omitted), and does find the aggravator at issue in the case > (FN27) invalid. However, as we have observed, > Espinosa and similar federal cases

focus upon vagueness, not upon whether the aggravators used were among those prescribed by the applicable death penalty statute; they therefore do not appear to suggest that non-statutory aggravating circumstances are necessarily invalid. To the contrary, once statutory aggravating circumstances have circumscribed the class of persons eligible for the death penalty, the federal Constitution does not require the sentencer to ignore other possible aggravating circumstances to the extent authorized in a state's capital sentencing statute. > Zant v. Stephens (1983), 462 U.S. 862, 878-79, 103 S.Ct. 2733, 2743-44, 77 L.Ed.2d 235.

> Bivins v. State, 642 N.E.2d 928, 954-55 (Ind.1994). Based on this assessment, we held in > Bivins that a trial court's consideration of non-statutory aggravating circumstances did not violate the Eighth Amendment. > Id. at 955.

In support of his state constitutional claim, Matheney cites > Bivins, 642 N.E.2d 928, where we held that consideration of nonstatutory aggravating circumstances violates Article One, Section Sixteen, of the Indiana Constitution. > Id. at 955-57. In > Bivins, the trial court considered victim impact evidence and did not distinguish its findings as to the death penalty from those relating to the sentences imposed for non-capital felony convictions. See > id. at 953-55.

In Matheney's trial, the jury instructions clearly informed the jury that it could only consider the charged (and valid) aggravators. > (FN28) The trial court specifically mentioned only the two charged aggravators in its sentencing statement. (Id. at 701-02.) Thus, the fact that > Indiana Code § 35-50-2-9(b) does not specifically state that "only listed aggravators may be considered" is irrelevant, because Matheney's sentencer clearly considered only

valid aggravators. Accordingly, Matheney's trial counsel were not ineffective for failing to make the assertion he advances here.

(e) Mitigation Contentions. Matheney makes various arguments for why > Indiana Code § 35-50-2-9(c), which specifies the mitigating circumstances a sentencer is to consider at the penalty phase of a capital trial, violates the Eighth and Fourteenth Amendments to the U.S. Constitution, and Article One, Sections Twelve, Thirteen, and Sixteen of Indiana's constitution. > (FN29)

> [44] The opening sentence of the section states, "The mitigating circumstances that may be considered under this section are as follows:...." > Ind.Code Ann. § 35-50-2-9(c) (West Supp.1996) (emphasis added). Citing federal precedent holding that a sentencer may not refuse to consider or be precluded from considering mitigating evidence, Matheney claims that the term "may" makes the consideration of mitigating evidence optional, thus allowing the sentencer to refuse to consider mitigating evidence. We disagree. The term "may" in this sentence simply means that any one of the listed mitigators following that sentence are permissible for consideration, including the "catch-all" provision which states, "Any other circumstances appropriate for consideration." Id.; see supra part IV.C.2(e). This interpretation is the more reasonable one, particularly when viewed in light of > § 35-50-2-9(e)(2), > (FN30) which requires a jury, before it can recommend death, to consider any existing mitigating evidence in order to find it outweighed by the charged aggravator(s). Because the code section at issue, when read in the light of the other relevant sections, does not make the consideration of mitigation optional, Matheney's trial counsel was not ineffective for failing to make the argument advanced here.

> [45] Matheney says counsel should have argued that > Ind.Code § 35-50-2-9(c) sets up barriers to the consideration of mitigating evidence in a capital case, first, by failing to specify that the only prerequisite to considering mitigating evidence is its relevance to the defendant's character, record, or the circumstances of the crime, and, second, by failing to provide any standard of proof. As to his first claim, Matheney fails to provide any insight into why the absence of such a specification would prevent a sentencer from considering otherwise relevant mitigating evidence. Thus, this claim is waived for failing to present any cogent argument in

support of it. > Armstead, 538 N.E.2d at 945. As to his second claim, we reject it for the reasons stated previously in part IV.C.2(g).

> [46] Matheney also claims that > Indiana Code § 35-50-2-9(c) is unconstitutional because it fails to provide an adequate definition of "mitigation." The entire support Matheney provides for this contention, however, is as follows:

The Supreme Court of Indiana has noted that "mitigating circumstances ... include virtually anything favorable to the accused." > Smith v. State, 547 N.E.2d 817, 822 (Ind.1989). This definition of mitigation is not within the common understanding of the average juror. > Canfield v. Sandock, 563 N.E.2d 1279, 1283 (Ind.1990) (technical and legal phrases used in instructions should be defined).

(Petitioner's Br. at 115-16.) We think the breadth of this definition and the ordinary understanding of the word "mitigating" is such that counsel who elected not to make the present contention were acting within the scope of the Sixth Amendment promise of effective counsel.

> [47] Matheney also argues that the mitigating circumstance "no significant history of prior criminal conduct," > Ind.Code Ann. § 35-50-2-9(c)(1) (West Supp.1996), is unconstitutional because the adjective "significant" creates "an unacceptable risk that the sentencer will view the defendant's record in terms of aggravation only, thereby converting the absence of a mitigator into an aggravator." (Petitioner's Br. at 116.) We see no reason to assume that juries would make such a leap. Matheney's earlier lawyers did not fail their client by taking a pass on this contention.

> [48]> [49] Matheney also argues that the mitigator "The defendant was less than eighteen (18) years of age at the time the murder was committed," > § 35-50-2-9(c)(7), is unconstitutional because it considers only chronological age, rather than also considering the defendant's emotional and intellectual age. Matheney's only support for this proposition, however, is a single sentence: "These are more accurate indicators of culpability than chronological age. See > Lockett, supra." (Petitioner's Br. at 117.) This argument is deficient for several reasons. First, it cites >

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), for its proposition that emotional and intellectual age are more accurate indicators of culpability than chronological age. Not only is "See > Lockett, supra," without more, an entirely inadequate citationcitation
of authority, but we can find nothing in > Lockett which remotely suggests that "intellectual" or "emotional" age (whatever those may mean) are better indicators of culpability than chronological age. > (FN31) Second, even if "intellectual" or "emotional" age is something that should be considered in a particular defendant's case, such evidence could be introduced and argued under the "catch-all" mitigator. We cannot see how Matheney's counsel were ineffective for failing to make the claim advanced here.

V. Trial Court's Pre-Sentence Psychological Questionnaire

After this case was fully briefed, Matheney's counsel learned that Judge James Letsinger, who sentenced Matheney to death, had regularly caused the probation department to administer a pre-sentence questionnaire to all defendants sentenced in his court. Matheney moved to hold his appeal in abeyance so he could return to post-conviction court for discovery and litigation regarding whether Judge Letsinger had used the questionnaire in sentencing him and, if so, whether that use violated > Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). This Court perceived the need for more information, so we directed Judge Letsinger to answer certain questions in regards to this issue. > (FN32) After receiving Judge Letsinger's answers, we directed Matheney to submit a supplemental brief addressing any substantive and/or procedural claims he might have regarding the questionnaire.

The details surrounding this issue show that Matheney did fill out Judge Letsinger's questionnaire, the questions of which were adapted from the Minnesota Multiphasic Personality Inventory, or "MMPI." > (FN33) Whether a copy of this completed questionnaire was provided to Matheney's counsel, however, is open to doubt. Judge Letsinger states that he has used this questionnaire with every defendant whom he has sentenced since at least 1979, and claims that it has always been attached to the presentence investigation report submitted to the defendant prior to sentencing. (Petitioner's Supp. Br. at A-32, A-54.) Matheney's

trial counsel states that although he was generally familiar with Judge Letsinger's questionnaire, he does not specifically remember if it was attached to Matheney's presentence report. He claims, however, that if it had been attached, it would still be there, because he would not have removed it. (Id. at A-59.)

Matheney also presents an affidavit from another attorney who has practiced in Judge Letsinger's court who received a presentence investigation report on his client that did not have a psychological evaluation questionnaire attached to it. (Id. at A60.) Finally, Matheney presents the deposition of Lake County's director of probation, taken in preparation for the post-conviction petition of Reynaldo Rondon, in which the director testifies that Rondon's completed questionnaire was given only to Judge Letsinger, and that copies were not routinely given to defense counsel. (Petitioner's Supp. Br. at A-25.) While Judge Letsinger acknowledges that he reviewed Matheney's completed questionnaire, he believes that he did not rely on it when determining the appropriate sentence for Matheney. (Id. at A-53.)

> [50] Matheney makes five arguments about this questionnaire. First, he claims that failure to submit the completed questionnaire to Matheney's trial counsel violated Matheney's due process rights as articulated in > Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (plurality) (remanding for a new sentencing hearing a death sentence that was based, in part, on information not disclosed by court to defense counsel prior to the sentencing hearing). Second, he claims this failure also violated his right to be free from cruel and unusual punishment under Article One, > Section 16, of Indiana's constitution. Third, he claims that this failure violated > Indiana Code § 35-38-1-12, which requires the sentencing court to advise the defendant or counsel of the factual contents and the conclusions of the presentence investigation. Fourth, he claims that the trial court's review of "secret information" in its sentencing prevented meaningful appellate review of Matheney's death sentence. Finally, Matheney claims that any decision by this Court other than vacating Matheney's death sentence would violate his rights under the U.S. and Indiana Constitutions because this Court's investigation of this issue "has not developed the facts sufficiently for Matheney to substantiate his claim that his death sentence is based, at least in part, on

information Matheney had no opportunity to explain." (Petitioner's Supp. Br. at 16-17.)

All of Matheney's claims share one common premise. They do not allege a violation of Matheney's rights by the administration of the questionnaire, per se. Rather, Matheney's various claims all rise or fall based upon the allegation that Matheney did not have the opportunity to contest information which may have influenced the judge in his sentencing decision, because Matheney was not given this information by the judge.

The Indiana Code does provide that defendants receive the products of the presentence investigation. We find this particular product, the Letsinger questionnaire, an unimpressive one. As interpreted by persons trained in its use, a completed MMPI might have some value in making certain sentencing decisions.

Rather than remand this case to the post-conviction court so it can delve into a factual and legal morass involving a three-page questionnaire the trial judge says played no role in sentencing, we will independently review the proper aggravating and mitigating circumstances absent the psychological questionnaire at issue and determine whether the death sentence in this case is appropriate, > Lambert v. State, 675 N.E.2d 1060, 1065 (Ind.1996), thereby making the claims surrounding this psychological questionnaire moot.

> [51] The charged aggravating circumstances were killing by "lying in wait," and killing while committing or attempting to commit burglary. As fully discussed in our previous opinion, there was abundant evidence proving this aggravator beyond a reasonable doubt. > Matheney v. State, 583 N.E.2d 1202, 1208-09 (Ind.1992). There is also ample evidence showing that Matheney broke into Bianco's home with the intent to commit murder therein. The "breaking" aspect is irrefutable: the evidence showed that he broke through the backdoor to gain entry into the house. The evidence indicating that he intended to commit murder after breaking in is also strong: he had repeatedly expressed an intention to kill Bianco and had tried to solicit others to do so; he went straight to Bianco's Mishawaka home, instead of to Indianapolis, on his eight-hour pass from the Pendleton correctional facility, stopping only at his mother's home to drop her

off and at Rob Snider's home to change his clothes and get one of Snider's shotguns;
and he pursued Bianco with the gun in hand as she ran from her home dressed only in her underpants, striking her repeatedly upon catching her until the gun shattered from the force of the blows. Few things short of fear of imminent death would drive the average female out of her urban home across the street and over to the house of a neighbor in the middle of the day dressed only in her underpants.

The evidence also suggests some arguably mitigating circumstances. First, the defendant was extremely angry with the victim, which could be evidence that he was under the influence of an extreme mental or emotional disturbance when he killed Bianco. > Ind.Code Ann. § 35-50-2-9(c)(2) (West Supp.1996). However, as Judge Letsinger noted, there was also evidence tending to show that his anger did not rise to the level that it dominated his actions.

The video tape after his arrest that day shows a calm demeanor with Matheney discussing the case disposition just after the fact. This attitude is entirely consistent with the witness description of his calm demeanor before the fact. He had given no one any indication of emotions out of control. These witnesses had known and observed his behavior from birth.

(Petitioner's Br. at A-1–A-2.) Thus, we can only afford this mitigator slight weight.

Second, while evidence was offered supporting the contention that Matheney suffered from a mental disease which caused him to view life through a distorted and deluded version of reality, (see, e.g., T.R. at 2724-32), there was little evidence tending to show that this alleged mental disease left Matheney literally no other choice but that of killing Lisa Bianco. While it may have caused him to believe that Bianco and others were conspiring to keep him incarcerated and deprive him of his rights, we are still left with the question of why that belief would necessarily drive Matheney to kill Bianco instead of simply sticking to legal, lawful avenues of exposing this perceived unlawful conspiracy. While hate, jealousy and vengeance may be motivations which are undesirable and often lead people to do things they otherwise would not do, we do

not consider people who act upon these [illegible]vations to be "mentally ill" or unable to "conform their [illegible]nduct to the requirements of the law," per se. Moreover, other evidence before the trial court supported its finding that this mitigating circumstance was not present. See supra note 13. Thus there is little if any weight for this mitigator available to effect the significant weight of the two proven aggravators.

Finally, we note that the jury fully considered the aggravators and mitigators and recommended the death sentence upon concluding that latter outweighed by the former, > Matheney, 583 N.E.2d 1202, 1209 (Ind.1992), and did so without the aid of the psychological questionnaire at issue. Our reweighing of the statutory aggravators and mitigators, also without consideration of the contents of Judge Letsinger's psychological questionnaire, amply demonstrates that the aggravating circumstances outweighed the mitigating circumstances and that death is appropriate for this offense and this offender.

Conclusion

We affirm the judgment of the post-conviction court.

DICKSON, SULLIVAN and SELBY, JJ., concur.

BOEHM, J., concurs with separate opinion.

BOEHM, Justice, concurring.

For the reasons stated in my dissent in > Lambert v. State, 675 N.E.2d 1060 (Ind.1996), I believe that a procedurally defective sentencing order in a death penalty case should require remand for resentencing. Based on this record I cannot conclude that the sentencing decisions of the court were unaffected by the questionnaire described in the court's majority opinion. It appears more probable than not that the questionnaire was never communicated to the parties. In a matter as sensitive as a death penalty proceeding, the greatest care must be taken to afford all parties the opportunity to present their issues in a full and fair proceeding. The slightest ex parte communication runs the risk of tainting the proceeding. However,

I do not believe I should refrain from participation in the reweighing exercise directed by the majority on the ground that I would not have designed the process to include it. For that reason I concur in all portions of the opinion, except as to part III, and concur in result as to part III.

Having explained this position, I do not expect to find it necessary to reiterate it in future cases in the unhappy but foreseeable circumstance that the same issue presents itself again.

> (FN1.) Although Dr. Jeffrey L. Smalldon, a psychologist testifying for the defense, took strong issue with the opinions of Dr. Berkson and other professionals who evaluated Matheney, see (P.C.R. at 1764-66), the trier of fact is not required to believe expert testimony on mental status, > Smith v. State, 502 N.E.2d 485 (Ind.1987), and could very easily have accepted the opinions of the experts who evaluated Matheney before his trial and have discounted the observations of Dr. Smalldon after viewing Matheney and engaging him in a series of questions and answers.

> (FN2.) Cf. > People v. Owens, 139 Ill.2d 351, 151 Ill.Dec. 522, 527, 564 N.E.2d 1184, 1189 (1990) (postconviction petitioners may be presumed competent); > Medina v. California, 505 U.S. 437, 445-52, 112 S.Ct. 2572, 2577-81, 120 L.Ed.2d 353 (1992) (upholding statute allocating burden of establishing incompetency to defendant).

> (FN3.) "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." > Ind. Const. art. III, § 1.

> (FN4.) "The judicial power of the State shall be vested in one Supreme Court, one Court of Appeals, Circuit Courts, and such other courts as the General Assembly may establish." > Ind. Const. art. VII, § 1.

> (FN5.) "The Supreme Court shall have no original jurisdiction except in ... supervision of the exercise of jurisdiction by the other courts of the State...." > Ind. Const. art. VII, § 4.

> (FN6.) The following statement by Magistrate Page illustrates the substantial degree of control maintained by Judge Conroy in this proceeding:

The Court:

....

The procedure followed in this case is that at every stage of these proceedings, Judge Conroy has been involved, if not more, than I have, in terms of reviewing the motions, researching legal issues that have come up. He has called me in from time to time to give me direction on certain points, to draw my attention to certain research. He has certainly read Mr. Matheney's pro se pleadings that have been offered in detail, because he has explained their content to me, more than I have read the motions myself.

After this hearing is concluded, I will draw up findings, both in discussions with Judge Conroy beforehand and in discussions with Judge Conroy after drafts are made. We will go over them, back and forth, and before a final decision is made. A final decision will be made by Judge Conroy alone. He will have reference to this tape. He will have reference through [sic] all of the documents that are submitted....

(P.C.R. at 1212-14.)

> (FN7.) Acting appropriately as a magistrate, Page need not have also been a judge pro tem or a special judge, as Matheney contends. The constitutionality of a similar act involving magistrates was previously challenged in this Court over fifty years ago. The arguments did not surround the power of the legislature to pass such an act, however; rather, the issue was whether or not it was a violation of the constitution to allow judges, and not the governor, to do so. The power of the legislature to create magistrate courts was never questioned. See > Petition for Appointment of Magistrates, 216 Ind. 417, 24 N.E.2d 773 (Ind.1940).

> (FN8.) We note that Matheney's counsel submitted an affidavit only from the public defender present concerning what the magistrate allegedly said and did during this particular instance,

but did not also submit an affidavit from the Lake County prosecuting attorney who was also present, even though it appears that the latter received a subpoena from Matheney's counsel to provide such testimony. (See P.C.R. at 1190-91.)

> (FN9.) Likewise, Matheney's affidavit from Deputy Public Defender John A. England to the effect that Magistrate Page "left the impression he was not pleased about whatever was in the Matheney pleading," (P.C.R. at 379), does little to show prejudice against Matheney.

> (FN10.) The same is true of Matheney's complaint about the magistrate's inquiry to Sullivan about whether her possible receipt of a subpoena was a matter subject to rules on confidentiality.

> (FN11.) Normally, the failure to challenge trial counsel's ineffectiveness on direct appeal constitutes its waiver from post-conviction consideration. > Spranger v. State, 650 N.E.2d 1117, 1121 (Ind.1995) (citing > Hollonquest v. State, 432 N.E.2d 37, 39 (Ind.1982)).

However, when the same attorney represents a defendant both at trial and on appeal and does not raise on appeal the issue of trial counsel ineffectiveness, we have been reluctant to apply waiver "and thus forever foreclose appellant from raising the question of the competency of his trial counsel."

> Spranger, 650 N.E.2d at 1121 (quoting > Majors v. State, 441 N.E.2d 1375, 1376 (Ind.1982).) As in > Spranger, one of Matheney's trial counsel, Scott L. King, was his sole attorney on appeal. Accordingly, we will follow our prior precedent, see also > Askew v. State, 500 N.E.2d 1219 (Ind.1986), and review Matheney's post-conviction challenges to the effectiveness of his trial counsel's assistance.

> (FN12.) For example, the post-conviction court listed sixty-one separate ineffective assistance allegations pertaining to appellate counsel alone in its Findings of Fact/Conclusions of Law. (See P.C.R. at 892-929.)

> (FN13.) We stated:

Appellant ... argues that his ability to conform his conduct to the requirements of the law was impaired by his mental disease. However, the defense psychiatrist offered a diseased-mind diagnosis which was rejected by the jury. The facts show that appellant is intelligent and manipulative.

The manner in which appellant prepared for killing Bianco, the way in which he approached Bianco's house, and then carried out the plan indicate that he was not extremely mentally and emotionally disturbed at the time of the murder. Further, appellant had expressed repeatedly an intention to kill Bianco and had tried to solicit others to do so. This evidence supports the trial court's finding that this mitigating circumstance was not present.

> Matheney v. State, 583 N.E.2d 1202, 1209 (Ind.1992).

> (FN14.) In this same vein, Matheney's appellate counsel would also not be considered ineffective for failing to raise the issue of Matheney's competency either to stand trial or proceed on appeal.

> (FN15.) Counsel seems to misunderstand the nature of "fundamental error." If an error is fundamental, then it is so grave that it must be addressed on appeal regardless of whether the issue was otherwise properly "preserved." See, e.g., > David v. State, 669 N.E.2d 390, 392 (Ind.1996) ("Where an appellate court finds the error to be fundamental, such error need not be preserved by a contemporaneous objection.... 'To qualify as "fundamental error," the error must be a substantial blatant violation of basic principles rendering the trial unfair to the defendant.' ") (quoting > Townsend v. State, 632 N.E.2d 727, 730 (Ind.1994) (citations omitted)).

> (FN16.) Matheney does claim in his petition that his trial counsel was ineffective for failing to object to the admissibility of this line of questioning on the part of the prosecutor. (P.C.R. at 246-47, 250.) However, Matheney's trial counsel did object to this line of questioning, twice. (T.R. at 2415-16, 2443-49.)

> (FN17.) Matheney's petition does state, "Matheney was denied the effective assistance of counsel by numerous acts and omissions of appellate counsel.... Those acts and omissions include, but are

not limited to, the following:" (P.C.R. at 230 (emphasis added).) However, this non-committal phrase is insufficient to preserve every conceivable claim of appellate counsel ineffective assistance not mentioned in the petition.

> (FN18.) Penalty phase final instruction twelve states:

In the State of Indiana, if the death penalty is not imposed, the sentence for murder is a fixed sentence of from thirty (30) to sixty (60) years. The presumptive penalty is forty (40) years. The Court at sentencing imposes a specific number of years within that range.

In the State of Indiana, a defendant can earn credit for good behavior to apply against the sentence, with a maximum allowable credit of fifty percent [sic] (50%) of the sentence imposed by the Court.

(T.R. at 676.)

> (FN19.) Counsel's brief leaves its own impression, saying, "Matheney was prejudiced by this instruction; studies show that the amount of time the jury believes a defendant will actually serve is a very important factor in deciding whether to recommend the death penalty. > Simmons v. South Carolina [512 U.S. at 159], 114 S.Ct. at 2191." (Petitioner's Br. at 104 (emphasis added).) Review of > Simmons at that citation, however, shows much less than Matheney's statement would have us believe. Instead of there being multiple "studies," there was a single public opinion survey. Instead of it being representative of juries in general (and, thus, relevant here), the sample pool was limited exclusively to South Carolinians qualified for jury duty. See > Ind.Professional Conduct Rule 3.3 cmt. Misleading Legal Argument.

> (FN20.) Contrary to Matheney's assertions, this case does not hold that due process requires a jury to be correctly instructed about sentencing alternatives available in lieu of a death sentence. Neither does it imply that the fear of a defendant "getting out" after a term of years inherently influences a jury's death sentence deliberation. > Simmons specifically deals only with a capital defendant's ability to rebut assertions of future dangerousness when the State has argued that issue before the jury, a situation

where "the actual duration of the defendant's prison sentence is indisputably relevant." > Simmons, 512 U.S. at 163, 114 S.Ct. at 2194.

> (FN21.) It is apparent that Matheney has little interest in these contentions. See colloquy quoted supra part III.A. Present counsel present them as free-standing constitutional challenges, but they are not available to him except as they reflect on the performance of prior counsel.

> (FN22.) Specifically, its Fifth, Sixth, Eighth, and Fourteenth Amendments.

> (FN23.) Specifically, > Article 1, Sections Twelve, Thirteen, Fourteen, Sixteen, and Twenty-three.

> (FN24.) Although Matheney claims that this potential for "prosecutorial abuse" violates many provisions of both the U.S. and Indiana Constitutions, he fails to allege any violation other than denial of the right to an impartial jury. (See Petitioner's Br. at 107-08.) Accordingly, any other violations arising from this potential for alleged abuse are waived.

> (FN25.) Although Matheney makes an "as applied" challenge, he fails to allege any facts tending to show that the prosecutor in his case used his power to achieve the ends called impermissible by Matheney. Thus, Matheney's contention that his trial counsel was ineffective for failing to make this "as applied" claim is waived. Ind.Appellate Rule 8.3(A)(7); cf. > Armstead v. State, 538 N.E.2d 943, 945 (Ind.1989) (finding appellant's contention waived on appeal for failure to support claim with cogent argument or facts from the record).

> (FN26.) Matheney also claims that our death penalty statute violates United States and Indiana constitutional prohibitions against double jeopardy. However, his convoluted arguments appear to be premised upon the notion that Matheney was convicted of felony murder. (See Petitioner's Br. at 110-11.) Because Matheney was charged and convicted of intentional murder, > Ind.Code Ann. § 35-42-1-1(1) (West 1986), and not felony murder, id. > § 35-42-1-1(2) (West Supp.1989) (amended 1989, 1993), (T.R. at 12), he has no standing to make this

argument. > Minnick v. State, 544 N.E.2d 471, 476 (Ind.1989); > Fleenor v. State, 514 N.E.2d 80, 92 (Ind.1987). Therefore, Matheney's trial counsel was not ineffective for failing to make a claim that he lacked standing to make. To the extent that Matheney claims a double jeopardy violation premised upon intentional murder and the felony murder aggravator, his claim is waived for lack of cogent argument, Ind.Appellate Rule 8.3(A)(7). > Armstead, 538 N.E.2d at 945.

> (FN27.) The trial court in > Espinosa instructed the jury that a potential aggravating circumstance it could find was that the murder was " 'especially wicked, evil, atrocious or cruel.' " > Espinosa, 505 U.S. at 1080, 112 S.Ct. at 2927 (quoting Fla.Stat. § 921.141(5)(h)).

> (FN28.) The jury was instructed that the State could seek the death penalty by charging that the defendant committed murder either by "intentionally killing the victim while committing burglary," or "by lying in wait." (T.R. at 666.) The jury was then instructed that "the burden is upon the State to prove to you beyond a reasonable doubt the aggravating circumstance set forth in the charging information wherein the State is seeking the death penalty." (Id. at 671.) The jury was then instructed that "[i]f the State failed to prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances, you shall not recommend the death penalty." (Id. at 674.)

> (FN29.) Although Matheney cites these provisions in his heading, he rarely provides separate legal analysis concerning > Indiana Code § 35-50-2-9(c) and these Indiana constitutional sections. Accordingly, except for those arguments specifically providing such separate legal analysis, these claims are waived. > Tobias v. State, 666 N.E.2d 68, 72 n. 1 (Ind.1996); > St. John v. State, 523 N.E.2d 1353, 1355 (Ind.1988).

> (FN30.) "The jury may recommend the death penalty only if it finds: ... (2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances." > Ind.Code Ann. § 35-50-2-9(e)(2) (West Supp.1989) (amended 1993). > Section 35-50-2-9(g)(2) makes the same mandate upon the court, if the hearing is to the court alone. Id. > § 35-50-2-

9(g)(2). These two sections are currently reflected in > § 35-50-2-9(k) (West Supp.1996).

> (FN31.) In fact, the plurality opinion seems to indicate that chronological age is something that should generally be considered in mitigation. See > Lockett, 438 U.S. at 608, 98 S.Ct. at 2967 (complaining that under Ohio's mitigation scheme, "consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision") (emphasis added).

Also, factors which assess a defendant's degree of "culpability" are for the legislature, not the judiciary, to determine. Unless a statutorily created aggravating circumstance violates some constitutional right of a defendant, we are not the proper forum for determining what aggravating circumstances are or are not "appropriate."

> (FN32.) The questions of Judge Letsinger and his corresponding answers relevant to our opinion are as follows:

Question 1: Did you review a questionnaire that was completed by Alan Matheney in connection with Lake Superior Cause No. 45G02-9001-CF-22?

Answer: Yes.

....

Question 3: Did you rely on Matheney's responses to the questionnaire when sentencing him? If so, please explain.

Answer: It is difficult to reproduce thought processes which are over six (6) years old. I do not think I relied on any one answer or series of answers. If I had relied on any answer in the questionnaire, I would have specifically noted the same in my written findings. There was no such notation.

....

Question 5: Was a copy of the completed questionnaire (sic) to Matheney or his counsel? If so, please state when and to whom.

Answer: Yes. The questionnaire is an exhibit to the pre-sentence investigation report. Whenever counsel for the defendant received his copy of the pre-sentence, which is usually one (1) or two (2) days before sentencing, he got a copy of the questionnaire.

(Petitioner's Supp. Br. at A-53, A-54.)

> (FN33.) The questionnaire is three pages long. It asks for yes or no answers to various questions, such as "I seem to be about as capable as most others around me." (See Appendix to Appellant's Supp. Br. at A-55--A-57.)

EXHIBIT C

United States Court of Appeals,
Seventh Circuit.
Alan L. MATHENEY, Petitioner,
v.
Rondle ANDERSON, Respondent.
No. 99-3657.
Argued June 29, 2000.
Decided June 18, 2001.

Defendant, who was convicted of murder and burglary and sentenced to death, appealed from an order of the United States District Court for the Northern District of Indiana, Allen Sharp, J., > 60 F.Supp.2d 846, which denied his habeas petition without holding an evidentiary hearing. The Court of Appeals, Coffey, Circuit Judge, held that: (1) evidentiary hearing was required to determine whether defendant received ineffective assistance of counsel because his defense team did not pursue his request for a hearing on his competency to stand trial prior to the commencement of trial, and (2) defendant did not meet his burden of establishing prejudice resulting from counsel's failure to present defense psychiatrist's testimony at penalty phase of capital trial to establish existence of a factor mitigating against imposition of the death penalty.

Affirmed in part; remanded with instructions.
Ilana Diamond Rovner, Circuit Judge, filed opinion concurring in part and dissenting in part.
West Headnotes

> [1] > KeyCite this headnote

> 197 Habeas Corpus
> 197I In General
> 197I(D) Federal Court Review of Petitions by State Prisoners
> 197I(D)5 Availability of Remedy Despite Procedural Default or Want of Exhaustion
> 197k405 Cause or Excuse
> 197k406 k. Ineffectiveness or Want of Counsel.

Hearing on whether counsel was constitutionally deficient in failing to establish petitioner's competency to stand trial could not be barred by counsel's failure to secure a hearing and develop a

record in state court, the very product of the alleged ineffectiveness. > U.S.C.A. Const.Amend. 6; > 28 U.S.C.A. S 2254(e)(2).

> [2] > KeyCite this headnote

> 197 Habeas Corpus
> 197III Jurisdiction, Proceedings, and Relief
> 197III(C) Proceedings
> 197III(C)3 Hearing
> 197k742 k. Discretion and Necessity in General.

Under pre-Antiterrorism and Effective Death Penalty Act (AEDPA) standards, a federal evidentiary hearing is required if (1) a habeas petitioner alleges facts which, if proved, would entitle him to relief and (2) the state courts– for reasons beyond the control of the petitioner-never considered the claim in a full and fair hearing. > 28 U.S.C.A. S 2254(e)(2).

> [3] > KeyCite this headnote

> 110 Criminal Law
> 110XXIV Review
> 110XXIV(G) Record and Proceedings Not in Record
> 110XXIV(G)15 Questions Presented for Review
> 110k1113 Questions Presented for Review
> 110k1119 Conduct of Trial in General
> 110k1119(1) k. In General.

An adequate record is imperative to properly evaluate ineffective assistance claims. > U.S.C.A. Const.Amend. 6.

> [4] > KeyCite this headnote

> 197 Habeas Corpus
> 197III Jurisdiction, Proceedings, and Relief
> 197III(C) Proceedings
> 197III(C)3 Hearing
> 197k745 Criminal Cases

> 197k746 k. Counsel.

Evidentiary hearing was required to determine whether habeas petitioner received ineffective assistance of counsel because his defense team did not pursue his request for a hearing on his competency to stand trial prior to the commencement of trial; question had been raised as to petitioner's mental capacity to stand trial by defense psychiatrist's deposition testimony. > U.S.C.A. Const.Amend. 6; > 28 U.S.C.A. S 2254(e)(2).

> [5] > KeyCite this headnote

> 92 Constitutional Law
> 92XII Due Process of Law
> 92k256 Criminal Prosecutions
> 92k268.2 Disadvantaged Persons, Counsel and Trial
> 92k268.2(2) k. Incompetents or Psychopaths; Determination of Sanity.

A defendant who is tried and convicted of a crime while legally incompetent has been denied his due process right to a fair trial. > U.S.C.A. Const.Amend. 14.

> [6] > KeyCite this headnote

> 110 Criminal Law
> 110XX Trial
> 110XX(B) Course and Conduct of Trial in General
> 110k641 Counsel for Accused
> 110k641.13 Adequacy of Representation
> 110k641.13(2) Particular Cases and Problems
> 110k641.13(7) k. Post-Trial Procedure and Review.

In the penalty phase of a capital case, to show prejudice resulting from counsel's deficient performance the defendant must demonstrate that a reasonable probability exists that, but for counsel's substandard performance, the sentencer would have concluded that the balance of aggravating and mitigating factors did not warrant death. > U.S.C.A. Const.Amend. 6.

> [7] > KeyCite this headnote

> 110 Criminal Law
> 110XX Trial
> 110XX(B) Course and Conduct of Trial in General
> 110k641 Counsel for Accused
> 110k641.13 Adequacy of Representation
> 110k641.13(1) k. In General.

Court need not determine the first, or "performance," prong of the > Strickland test for ineffective assistance of counsel, if court finds that counsel's alleged deficiency did not prejudice the defendant. > U.S.C.A. Const.Amend. 6.

> [8] > KeyCite this headnote

> 110 Criminal Law
> 110XX Trial
> 110XX(B) Course and Conduct of Trial in General
> 110k641 Counsel for Accused
> 110k641.13 Adequacy of Representation
> 110k641.13(2) Particular Cases and Problems
> 110k641.13(7) k. Post-Trial Procedure and Review.

Defendant did establish prejudice resulting from counsel's failure to present defense psychiatrist's testimony at penalty phase of capital trial to establish existence of a factor mitigating against imposition of the death penalty, where trial judge stated on the record that he gave no weight to that mitigating factor because, after hearing the testimony during the guilt phase of the trial, he agreed with the two court-appointed psychiatrists that defendant suffered from no mental disease or defect at the time of the murder. > U.S.C.A. Const.Amend. 6; > West's A.I.C. 35-50-2-9(c)(6).

> [9] > KeyCite this headnote

> 350H Sentencing and Punishment
> 350HVIII The Death Penalty
> 350HVIII(C) Factors Affecting Imposition in General

> 350Hk1653 k. Mitigating Circumstances in General.

> 350H Sentencing and Punishment
> 350HVIII The Death Penalty
> 350HVIII(C) Factors Affecting Imposition in General
> 350Hk1658 k. Manner and Effect of Weighing or Considering Factors.

Under Indiana law, the presence of one or more mitigating factors does not preclude imposition of the death penalty; rather, the statutory aggravating factors are weighed against the mitigating factors, and the resulting balance determines the appropriateness of the death penalty. > West's A.I.C. 35-50-2- 9.

> [10] > KeyCite this headnote

> 350H Sentencing and Punishment
> 350HVIII The Death Penalty
> 350HVIII(D) Factors Related to Offense
> 350Hk1676 k. Planning, Premeditation, and Calculation.

Evidence supported a finding that the "lying-in-wait" aggravator was proven beyond a reasonable doubt in capital murder trial; it was reasonable for the trier of fact to conclude that defendant had used a circuitous approach toward victim's house in order to conceal himself from her and that testimony regarding the amount of time involved tended to prove that defendant waited and watched until he could take victim by surprise, and the evidence regarding his use of a deadly weapon was indicative of his intent to kill.

> [11] > KeyCite this headnote

> 350H Sentencing and Punishment
> 350HVIII The Death Penalty
> 350HVIII(D) Factors Related to Offense
> 350Hk1681 k. Killing While Committing Other Offense or in Course of Criminal Conduct.

Indiana's felony murder aggravator in capital case applied to the forcible entry of a residence with the intent to commit murder.

> [12] > KeyCite this headnote

> 350H Sentencing and Punishment
> 350HVIII The Death Penalty
> 350HVIII(C) Factors Affecting Imposition in General
> 350Hk1658 k. Manner and Effect of Weighing or Considering Factors.

Under Indiana law, a sentencing judge is not permitted to consider evidence supporting a mitigating factor in isolation; rather, the judge is obligated to balance the strength of such evidence against the facts supporting the aggravating factors.

> [13] > KeyCite this headnote

> 110 Criminal Law
> 110XX Trial
> 110XX(B) Course and Conduct of Trial in General
> 110k641 Counsel for Accused
> 110k641.13 Adequacy of Representation
> 110k641.13(2) Particular Cases and Problems
> 110k641.13(7) k. Post-Trial Procedure and Review.

In light of facts underscoring the brutal nature of the murder and its occurrence inside the supposed sanctuary of victim's home, presentation of testimony from defense psychiatrist at sentencing phase to effect to defendant suffered from mental disease or defect, if it had been believed, would not have necessarily tipped the balance against imposition of the death penalty; thus, counsel's failure to present that testimony did not constitute ineffective assistance. > U.S.C.A. Const.Amend. 6.

> *1027 Alan M. Freedman (argued), Midwest Center for Justice, Chicago, IL, for petitioner-appellant.
> Michael R. McLaughlin (argued), Karen M. Freeman-Wilson, Office of the Attorney General, Indianapolis, IN, for respondent-appellee.

Before > COFFEY, > KANNE and > ROVNER, Circuit Judges.

> COFFEY, Circuit Judge.

On March 7, 1989, the State of Indiana charged Alan Matheney in a two- count indictment with murder and burglary. Matheney entered a plea of not guilty as to both counts. In April 1990, an Indiana jury found Matheney guilty on both counts and recommended the death penalty. The trial judge agreed, and on May 11, 1990, Matheney was sentenced to death.

After exhausting his state remedies, Matheney filed a petition on July 10, 1998, in federal court pursuant to > 28 U.S.C. S 2254 for a writ of habeas corpus challenging his convictions and death sentence. On July 30, 1999, the district court, without holding an evidentiary hearing, denied Matheney's habeas petition. See > Matheney v. Anderson, 60 F.Supp.2d 846 (N.D.Ind.1999). The court proceeded to grant a certificate of appealability on two issues: (1) whether the state trial court "should have found the petitioner incompetent to stand trial or, in the alternative, should have
granted an evidentiary hearing on the petitioner's competency to stand trial"; and (2) "whether the petitioner was denied effective assistance of counsel at the penalty and the sentencing phases of his trial...."

With respect to the second issue, Matheney claims that his trial attorney's performance fell below an objective standard of reasonableness when the attorney did not call the defense psychiatrist, Dr. Helen Morrison, to the stand during the penalty phase of the trial. Dr. Morrison had previously testified during the guilt phase of the trial, in support of Matheney's defense of insanity, that she believed Matheney suffered from a mental disease or defect at the time of the murder. Matheney claims that if Dr. Morrison had been called to the stand during the penalty phase, she could have offered testimony to establish the existence of a factor mitigating against imposition of the death penalty--that a mental disease or defect rendered Matheney incapable of conforming his conduct to the requirements of the law. We reject Matheney's claim because the trial judge, who is the ultimate decision-maker in matters of capital sentencing under Indiana law, stated on the record that he gave no weight to this mitigating factor because, after hearing the testimony during the guilt phase of the trial, he agreed with the two court-appointed psychiatrists that

Matheney suffered from no mental disease or defect at the time of the murder. Thus, we are convinced that Matheney has failed to demonstrate a reasonable probability that additional testimony from Dr.
Morrison during the sentencing phase of the trial would have resulted in imposition of a sentence other than death.
However, we remand this case for an evidentiary hearing on issues related to Matheney's alleged incompetency to stand trial and his lawyer's performance on issues related thereto. Matheney's trial attorneys filed a petition requesting the trial court to order independent psychiatrists to perform both a competency evaluation and *1028 a sanity evaluation. They then failed to follow through with the request for a competency evaluation after the trial court failed to include it in its order for a sanity evaluation. Given that a legitimate question has been raised as to Matheney's competency to stand trial and his lawyer's performance on this issue, we remand the case for an evidentiary hearing.
I. BACKGROUND
On March 4, 1989, the defendant, while on an eight-hour pass from prison,> [FN1] brutally murdered Lisa Bianco (his ex-wife and the mother of his two daughters, Amber and Brooke). The core facts of this case were succinctly set forth in the Indiana Supreme Court's opinion denying Matheney's direct appeal of his conviction:

> FN1. Matheney and Bianco were divorced on June 19, 1985, and Bianco was awarded custody of the couple's two daughters. Matheney initially was
granted supervised visitation. On the day of his first unsupervised visitation, July 3, 1985, Matheney seized his children and left Indiana for other parts of the United States. He was apprehended on August 23, 1985, in North Carolina and charged with confinement. He was convicted and sentenced on the confinement charge and of a battery charge stemming from an earlier physical attack on his ex-wife.

On March 4, 1989, appellant was given an eight-hour pass from the Correctional Industrial Complex in Pendleton, Indiana where he was an inmate. Appellant was serving a sentence for Battery and Confinement in connection with a previous assault on his ex-wife, Lisa Bianco, who was the victim in this case. The pass authorized a trip to Indianapolis; however, appellant drove to St.

Joseph County. Appellant went to the house of a friend, Rob Snider, where he changed clothes and removed an unloaded shotgun from the house without the knowledge of those present.

Appellant then drove to Mishawaka. He parked his car not far from Bianco's house and broke in through the back door. Bianco ran from her home, pursued by appellant. Neighbors witnessed the chase that ensued.

When appellant caught Bianco, he beat her with the shotgun which broke into pieces. One neighbor confronted appellant and saw him get into a car and drive away. Appellant surrendered to a policeman later that afternoon. The autopsy
showed that Bianco died as a result of trauma to the head from a blunt instrument.

> Matheney v. State, 583 N.E.2d 1202, 1204-05 (Ind.1992), cert. denied, > 504 U.S. 962, 112 S.Ct. 2320, 119 L.Ed.2d 238 (1992).

It is worth noting that at trial the prosecution introduced overwhelming evidence of Matheney's murder of Bianco. Ray Matheney, appellant's brother, and Rob Snider, a friend of appellant, testified at trial that Alan Matheney arrived at Snider's home at about 1:00 p.m. on March 4, 1989. Snider further testified that when Petitioner left Snider's home approximately one hour later, a gun belonging to Snider's stepson was missing. Matheney's daughter, Brooke, testified that she was at home with her mother in St. Joseph County on the afternoon of the Fourth when she saw her father enter the house and confront her mother. At her mother's request, Brooke ran next door to the home of Denise Sloan and asked Sloan to call the police. Sloan and several other neighbors testified that they watched Matheney violently assault and murder Bianco in the middle of the street by repeatedly striking her with a rifle. > [FN2] The evidence was so powerful that when defense counsel began *1029 his opening statement, he admitted: "On March 4, 1989, in the early afternoon, Alan Matheney beat his ex-wife to death in broad daylight, on a public streetcorner, in Mishawaka, Indiana." Defense counsel went on to argue that Matheney was insane at the time of the killing, his legal defense. Thus,
Matheney's petition for habeas corpus relief centers not on a claim of innocence, but rather that the legal system failed to properly insure that he was mentally competent to stand trial for his crimes and subsequently to be sentenced to death.

> FN2. Bianco's neighbor Wilbur Stockdale testified that he opened the front door of his home, yelled at Matheney, and then chased him until Matheney reached his car and drove away.

A. Pre-Trial Proceedings

Subsequent to charges being filed against Matheney in the St. Joseph County Indiana Superior Court, the court appointed the Public Defender's Office to represent him. Public Defenders Philip Skodinski and Charles Lahey were jointly appointed and entered an appearance on Matheney's behalf. After defense counsels' initial consultation with their client, they learned that Matheney was of the belief that his ex-wife had been having an affair with a local county prosecutor, Mike Barnes, and further, that Matheney allegedly believed the two had schemed to falsely imprison Matheney on trumped-up battery and confinement charges to "keep him out of the way."

On March 14, 1989, after learning of his client's belief in this conspiracy against him, Skodinski filed a "Notice of Insanity Defense and Request for
Examination by Out of Area Psychiatrists for Purpose of Determining Competency to Stand Trial and Sanity at the Time of the Alleged Offense." The motion requested "the appointment of two court-appointed psychiatrists, from outside St. Joseph County for the purpose of determining [1] the Defendant's competency to stand trial and [2] mental state at the time of the alleged offense." (emphasis added).

On March 27, 1989, the court held a hearing on defense counsel's motion and issued an order appointing two independent psychiatrists, Drs. Myron Berkson and George Batacan, to evaluate Matheney. The court's minutes state that the court ordered the doctors to evaluate Matheney as to (1) his sanity at the time of the offense, as well as (2) his competency to stand trial:

The Court further indicates that on March 27th this Court appointed Drs. Berkson and Balacan [sic], both of Michigan City, Indiana, for the purpose of determining competency to stand trial and sanity.

But on the same day as the hearing, the trial judge also signed a mimeographed order entitled "Order for Examination Concerning Sanity." This order made no mention of an investigation to determine the defendant's present competency to stand trial, but rather directed Drs. Berkson and Batacan to evaluate Matheney only with regard to his sanity at the time of the murder:

The Defendant, by his attorney of record, Phillip Skodinski, having filed notice of defense of insanity, the court now appoints Dr. Myron Berksen [sic],
M.D. and Dr. George A. Balacan [sic], M.D. to examine the defendant, to file a written report with the court, and to testify at hearing concerning the sanity or insanity of the defendant at the time of the alleged offense.
* * * *
Evidentiary hearing on defendant's sanity or insanity to be set upon receipt of the doctor's reports by the court. (emphasis added).> [FN3]

> FN3. The "Order for Examination Concerning Sanity" issued by the court was a "form" order containing boilerplate language regarding the appointment of doctors for an investigation into the sanity of a criminal defendant at the time of the commission of the offense.

*1030 Furthermore, when the court implemented its order and issued written instructions to the court-appointed doctors dealing with the scope of the psychiatric reports to be submitted, the court failed to direct the doctors to conduct and make findings regarding Matheney's competency to stand trial, as originally requested by defense counsel. Instead, the court's order limited the doctors' attention to the question of Matheney's sanity at the time of the commission of the crimes charged. The court's instructions to the independent psychiatrists read in pertinent part as follows:
IN YOUR OPINION, IS IT POSSIBLE THE DEFENDANT MAY HAVE BEEN INSANE AT
THE TIME OF THE CRIME? DATE OF CRIME:
FROM YOUR EXAMINATION OF THE DEFENDANT, DO YOU HAVE AN OPINION AS TO WHETHER THE DEFENDANT, AS A RESULT OF MENTAL DISEASE OR DEFECT, WAS UNABLE TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT AT THE TIME OF THE OFFENSE?
"MENTAL DISEASE OR DEFECT" MEANS A SEVERELY ABNORMAL MENTAL CONDITION THAT GROSSLY AND DEMONSTRABLY IMPAIRS A PERSON'S PERCEPTION, BUT THE TERM DOES NOT INCLUDE AN ABNORMALITY MANIFESTED ONLY BY REPEATED UNLAWFUL OR ANTISOCIAL BEHAVIOR > [FN4]

> FN4. Judge Swartz instructed the doctors in conformity with Indiana's legal test for insanity, codified at > Ind.Code S 35-41-3-6(a), which states:

A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.

The definition of "mental disease or defect" contained in her instructions quotes the definition adopted by the legislature. See > Ind.Code S 35-41- 3-6(b).

B. The Doctors' Reports

1. Drs. Batacan and Berkson individually reported to the court that Matheney was sane at the time he committed the crimes

a. Dr. Batacan

Dr. Batacan filed a five page undated > [FN5] report with the court indicating that he interviewed Matheney on two separate occasions, April 12, 1989, and June 21, 1989, "to determine the question of [Matheney's sanity] at the time of the commission of crime." Batacan's comprehensive report details, in narrative fashion, statements Matheney made during these interviews which explain how his anger lead to the murder of Bianco:

> FN5. In addition to being undated, the report is devoid of any file- stamp date as to when the report was filed with the court. Therefore, it is impossible to specifically determine when the report was prepared, other than to note it was after June 21, 1989 (the date of Dr. Batacan's second interview with Matheney) and prior to May 1990 (when Dr. Batacan testified at Matheney's trial).

When he left [the prison, Matheney] drove to Granger to his family's home from where he called his wife [Bianco].... She told him that they [Bianco and the prosecutor] would file more charges against him [and] that he'll never get out of prison. He grabbed an unloaded gun from a friend's house where he left some of his personal belongings. He was very upset at the time. Several things were going through his mind like "She killed her *1031 brother by giving him drugs, he was a good friend of mine.... I have two beautiful children and she left them and they were playing with drugs. She abused those children. She was a hateful

person .... I have no remorse for what happened, it was bound to happen because they put me in a position that I'll never get out of prison."

After Dr. Batacan completed two psychiatric interviews of Matheney which lasted a total of five hours, he made the following findings:

The defendant maintained a level of mental alertness throughout the examination and [was] able to engage in a[n] interview with spontaneity and cooperativeness. He is responsive, attentive and rather vigilant. His alertness refers to his ability to give an orienting response to the questions about any emotionally meaningful stimuli. He is coherent [in both] speech and thought. He sustains an ongoing ability of concentration without disruption. He is soft spoken and articulate.

He has an intact memory for both remote and recent events. He is fully oriented to time, place, person and specific situations. He denies experiencing unrealistic ideas and feelings. He has not experienced any distorted interpretation and perception of reality, such as hallucinations and delusions. His feelings of being aggrieved and beliefs of being unjustly [treated] are very real to him. His affect is appropriate. He does not show any signs and symptoms of mental disease or mental defect now nor during the event in question.

After relating his observations and findings, Dr. Batacan concluded that, despite Matheney's continuing belief that his imprisonment was the product of a conspiracy directed by a county prosecutor, Matheney "was legally sane at the time of the commission of the crime." Dr. Batacan concluded that (1) Matheney was not suffering from any form of "mental disease or defect" either at the time of the interviews or at the time of the murder of his ex- wife, and (2) Matheney was capable of recognizing the wrongfulness of his actions at the time the crime was committed.

b. Dr. Berkson

After interviewing Matheney twice,> [FN6] Dr. Berkson filed a report dated April 19, 1989, opining "that Alan Matheney did not suffer from a mental disease or defect such [that] he was unable to appreciate the wrongfulness of his conduct at the time of the offense." Like Dr. Batacan, Dr. Berkson supported his opinion that Matheney was legally sane during the commission of his crimes by noting the observations he made while interviewing Matheney:

> FN6. Dr. Berkson's report states that he interviewed Matheney on two different occasions, once on April 14, 1989, and on a previous date, but the report fails to disclose the date of the first interview.

He stated he was in good health, he was aware of the nature of the charges against him, he was aware of the functions of the various individuals involved in courtroom proceedings, he was aware of the difference between a lie and a mistake.... His verbalizations were generally logical, sequential, goal directed, and usually self serving. He talked of his relationship with his ex- wife who he felt had a personal relationship with the prosecutor * * * * [Matheney] reports he was told [that he could not serve time in an out-of-state jail], then he proceeded to give a rather detailed account of his activities on the day of the alleged offense.

He talked of increasing anger at his ex-wife because he felt she was keeping him incarcerated, that he had gone to *1032 her home to get tapes that would have shown he had done nothing wrong, that she and Michael Barnes had no intention "of letting me out of jail and would file other charges against me." He then detailed the rest of the events.

2. Neither Dr. Berkson nor Dr. Batacan rendered an opinion concerning Matheney's competency to stand trial.

As discussed previously, there is nothing in the record demonstrating that Drs. Batacan and Berkson were ever informed that competency to stand trial was an issue to be evaluated or by what standard competency was to be measured under Indiana law. As a result of this breakdown in communication, it is not surprising that neither Dr. Batacan nor Dr. Berkson filed reports relating a conclusion as to Matheney's competency to stand trial.

Conversely, it is startling that neither Matheney's counsel (who had properly seen fit to file a motion requesting an examination of Matheney's competency to stand trial) nor the trial judge (who, according to the court's minutes, purportedly ordered Drs. Batacan and Berkson to evaluate Matheney's competency to stand trial at the March 27, 1989 hearing on defense counsel's motion) ever raised a question regarding the reports' omission or inquired of the doctors as to whether they believed Matheney was competent to stand trial. The joint failure of defense counsel, the prosecution, and the court itself to (1) obtain qualified psychiatric evaluations from mental health professionals and (2) hold the hearing on defendant's competency to stand trial that defense counsel had

requested is particularly perplexing in light of the fact that this is a capital offense case.

C. The Change of Venue

On March 20, 1989, the prosecution initially filed a motion for a change of venue to move the trial from St. Joseph County, Indiana, which Matheney's public defenders successfully opposed. Later that year, Matheney personally concluded that a trial outside of St. Joseph County would shield him from the influence supposedly wielded by prosecutor Michael Barnes, whom he believed to be the ringleader of the conspiracy.> [FN7] Matheney consequently filed a
pro se motion requesting a change of venue, and at the December 21, 1989, hearing on the motion Matheney argued (over the strenuous objections of his attorneys) for a change of venue based on his belief that the alleged relationship between his deceased ex-wife and Barnes would taint his ability to get a fair trial in St. Joseph County, where Barnes served as a county prosecutor. At the hearing on his motion, Matheney stated:

> FN7. Not surprisingly, there is nothing in the record that supports Matheney's claim that Barnes' prosecution of him was prompted by any improper motive.

I feel that there is to [sic] many major issues being overlooked in this case and I feel the reasons for that is because of the victim's relationship with a certain prosecutor. I also have copies of statements from other witnesses of a trial back in '87 where witnesses were told certain things and the same thing is being repeated with the same witnesses. They are being told to say certain things by the prosecution....

* * * *

These attorneys here [his defense counsel], they're friends with Prosecutor Barnes in this case and they are not going to go in front of the courtroom and give a–, produce evidence to show that this guy was criminally involved in
this case. They got to work with this man every day. To many issues of this-, Frankenstein is being overlooked, so I *1033 feel that by taking this out of the County, then I can get a hold of a Judge, whoever is going to sit on it, and try to convince him ...

The trial judge granted Matheney's pro se motion for a change of venue, and the case was transferred to Lake County and assigned to Judge James Letsinger. As a result of the transfer of the case to

Lake County, the court-appointed public defenders (Skodinski and Lahey) requested that they be permitted to withdraw from representing Matheney.> [FN8] Judge Letsinger denied defense counsels' request to withdraw, but did appoint Scott King, a Lake County defense lawyer well-versed in the defense of death penalty cases, to act as lead defense counsel. Skodinski and Lahey were instructed to remain as co- counsel and assist when necessary.

> FN8. Skodinski and Lahey argued that, as public defenders for St. Joseph County, the change of venue outside St. Joseph County imposed severe transportation and caseload difficulties upon them.

D. Trial

As noted previously, Matheney's trial strategy admitted the murder of Bianco, but asserted that he was unable to appreciate the wrongfulness of his conduct
at the time of his offense as the result of a mental disease or defect, and therefore legally insane. See > Ind.Code S 35-41-3-6(a). To this end, defense counsel called Matheney's sisters who testified that he exhibited delusional behavior in jail when he requested copies of nonexistent documents that supposedly revealed the existence of Bianco's affair with prosecutor Barnes and its relation to his continued imprisonment. Defense counsel also called as witnesses attorneys who had previously represented Matheney in civil actions and thus were aware of his allegedly delusional behavior. Matheney's lawyers also called Dr. Helen Morrison, his defense psychiatrist, as their final witness.> [FN9] She testified that she had: 1) interviewed Matheney; 2) reviewed his previous mental history and reports, including the court- ordered reports of Drs. Batacan and Berkson; and 3) reviewed tapes of recorded phone conversations between Matheney and Bianco. According to Dr. Morrison, Matheney suffered from a "severe paranoid personality disorder that impairs his perceptions of reality and his perception of what is going on." Furthermore, Dr. Morrison opined that Matheney's paranoid personality disorder was "consistent" with the definition of a "mental disease or defect" used in Indiana's insanity defense.

> FN9. Dr. Morrison testified that she maintained a practice in both Hammond, Indiana, and Chicago, Illinois. She further testified that she

had been certified as an expert in more than 100 previous trials and had testified for both the prosecution and defense. Prior to testifying for Matheney, she had testified "three or four times" in Indiana, always for the prosecution.

Interestingly, Dr. Morrison did not offer any opinion (nor was she asked by any party or the court) whether Matheney could distinguish right from wrong at the time of the commission of the crime, as required by Indiana's insanity defense statute. > Ind.Code S 35-41-3-6(a).> [FN10] In fact, at post-trial deposition on October 7, 1994, Dr. Morrison testified that Matheney could appreciate the wrongfulness of his conduct at the time of the crime, and thus was sane:

> FN10. As noted, Indiana law requires that a defendant asserting the insanity defense prove both: (1) the existence of a mental disease or defect, and (2) that as a result of the mental disease or defect, he could not appreciate the wrongfulness of his conduct at the time of the crime. See > Ward v. State, 438 N.E.2d 750, 753 (Ind.1982).

Q: [I]n your opinion did Mr. Matheney understand the difference between right and wrong?

A: Yes, he did.

*1034 * * * *

Q: Did you and Mr. King [defense counsel] ever discuss your inability to opine that as to the second prong or the volitional prong of the insanity defense in Indiana?

A: I am not certain what you mean.

Q: In your opinion Mr. Matheney could distinguish between right and wrong?

A: Yes.

Q: Did you and Mr. King ever discuss the fact that in your testimony you cannot satisfy the cognitive portion of the insanity defense?

A: No.

After the defense rested, the trial court called and questioned both the court-appointed psychiatric experts, Dr. Batacan and Dr. Berkson, each of whom testified that Matheney was sane at the time he murdered his ex-wife because he was not suffering from "a mental disease or defect." On April 11, 1990, after one day of deliberation, the jury returned a verdict of guilty on both counts.

E. Sentencing

On April 12, 1990, a sentencing hearing was conducted before the same jury that had determined Matheney's guilt. At sentencing, neither the defense, the prosecution, nor the court chose to recall Dr. Morrison, Dr. Batacan, or Dr. Berkson. Defense counsel pursued a primary strategy of calling character witnesses, who testified that Matheney was a good father to his children, in an effort to stave off the death penalty. In his closing statement during sentencing, defense counsel relied primarily on the testimony of these character witnesses in asking the court to spare Matheney's life:

[We heard] testimony from the two friends of his, about Alan, and his brother was one of them, about Alan with the children.... He has produced and contributed to society, and has produced children. He has endeavored to maintain contact with his children, his daughters. There are positive aspects of this man. There is a humanity in this man.

Although relying primarily on character witnesses, defense counsel also argued that at the time of the murder, Matheney was unable to conform his conduct to the requirements of the law due to a mental disease or defect. > Ind.Code S 35-50-2-9(c) lists the mitigating circumstances that a jury may consider when deciding whether to recommend the imposition of the death penalty. One qualifying circumstance, known as the "inability to conform" mitigator, states that capital punishment may not be appropriate if:

[t]he defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect....

> Ind.Code S 35-50-2-9(c)(6). At the sentencing hearing, defense counsel asserted that the testimony elicited at trial established that Matheney suffered from a mental disease or defect that substantially impaired his ability to act lawfully:

Third, is subsection 6 under the mitigating circumstances, the ability to conform to the requirements of the law, appreciate wrongfulness of conduct, due to the existence of mental illness, mental disease. It's a cousin, sort of, of the insanity defense.

We have presented evidence, I believe, simply not medical evidence, but other evidence: something was wrong. And something was wrong with Mr. Matheney. Did he know right from wrong? There's arguments that are advanced and were advanced

both ways. But here, we have the additional clause of the ability to conform one's conduct to the requirements of the law even if one *1035 is able to appreciate the wrongfulness of that conduct. The jury rejected the defense's arguments and returned a unanimous recommendation that the death penalty be imposed. The trial judge agreed with the jury's recommendation, and on May 11, 1990, Matheney was sentenced to death.> [FN11]

> FN11. In 1992, Matheney was denied relief by the Indiana Supreme Court on direct appeal. The court held that: (1) Matheney was not entitled to have the jury instructed on manslaughter grounds because there was no evidence that Bianco had "provoked" him into acting with the "sudden heat of passion"; and (2) sufficient evidence supported the trial court's decision that the prosecution proved aggravating circumstances warranting imposition of the death penalty. See > Matheney v. State, 583 N.E.2d 1202 (Ind.1992), cert. denied, > 504 U.S. 962, 112 S.Ct. 2320, 119 L.Ed.2d 238 (1992).

F. State Court Post-Conviction Proceedings

In November 1992, Indiana Public Defender Jeff Merryman was substituted by the Public Defender's Office to represent Matheney. On November 25, 1992, Merryman filed a petition in Indiana state court requesting post-conviction relief on Matheney's behalf. At a September 9, 1994, hearing on the petition held before a state court magistrate, Merryman filed an amended petition for post-conviction relief raising the question of Matheney's competency to stand trial. > [FN12] The amended petition for post-conviction relief specifically asserted the following errors relating to Matheney's alleged lack of competency to stand trial:

> FN12. On the same day as the hearing on Matheney's petition for post- conviction relief, defense counsel sought a stay of the post-conviction proceedings on the ground that Matheney was incompetent to proceed with the hearing. Interestingly, Matheney resisted his attorneys' tactics by filing pro se motions offering to prove his own competence to proceed with the post-sentencing hearing.

8(G) Matheney was denied his right to a fair trial, to due course and due process of law, and to be free from cruel and unusual punishment when he was subjected to a criminal trial despite being

incompetent to understand the nature of the proceedings or to assist in defending the charges against him.

* * * *

9(c)(6) Trial and appellate counsel were ineffective in their failure to notify the court that Matheney was incompetent at all stages of this litigation. Matheney was incompetent to stand trial, and was incompetent to proceed on direct appeal.

* * * *

9(G) Matheney was not competent to stand trial. His inability to trust trial counsel rendered him unable to provide them with any meaningful assistance in devising a defense to the charges against him. Nor was Matheney able to form a rational understanding of the proceedings against him. Had Matheney's competence been pursued and properly litigated, Matheney would have been found not competent to defend the charges.

Under Indiana law, a defendant is competent to stand trial if "the court finds that the defendant has the ability to understand the proceedings and assist in
the preparation of the defendant's defense." > Ind.Code S 35-36-3-1(b). In support of the post-conviction argument that Matheney was incompetent to stand trial, defense counsel presented the state magistrate judge with a combination of depositions and affidavits, drawn primarily from family members, former defense attorneys, Dr. Morrison, and Dr. Berkson, in an attempt to illustrate that Matheney could not assist in preparing his defense. Dr. Morrison's deposition *1036 testimony pointed out that she felt Matheney was not competent to be tried:

He [Matheney] was not rational. He continued through the time that I had seen him to believe that this was a conspiracy on the part of Michael Barnes and Lisa Bianco, that he would not be in the position if it had not been for them, that those tapes were the only thing that would exonerate him. I think I was asked a question about a session where those were the primary thoughts that continued with him. He had no concept in my opinion of what was going on as far as his role in the trial was concerned. To him the only thing that was important and the only thing that this trial was going to do was to prove that he had not threatened Lisa Bianco because those tapes could be available.

* * * *

He was not capable of [rationally consulting with trial counsel] because the delusion that he maintained interfered with any ability to look at the reality of what he needed to go through as far as the

trial was concerned, what the charges were. Everything to him remained and remains a conspiracy. (emphasis added).

Contradicting Dr. Morrison's opinion were Matheney's three trial attorneys, who testified that Matheney did understand the proceedings and was able to assist in his own defense. When asked if he felt that Matheney was competent to stand trial, Philip Skodinski stated:

I think he was [competent]. I mean, some of his ideas were [not] good ideas, but that doesn't necessarily mean he wasn't competent to use his own defense. He wanted to interview people and use them as witnesses which some weren't very good people to use as witnesses. But I am not sure that's the criteria to provide you are not competent to assist in your own defense. It depends on what you feel is competent.

Public Defender Charles Lahey concurred with Skodinski, stating his belief that Matheney was competent to be tried: "Despite his obsessive conduct, I didn't find Alan that incapable of planning his own defense. In fact, he was actively planning it although it wasn't right in all regards." Lead defense counsel Scott King similarly testified that Matheney did not cooperate with counsel to the full extent of his ability "partially because he didn't want to." > [FN13]

> FN13. Further, on direct questioning from the state magistrate judge at Matheney's state post-conviction proceedings, Matheney exhibited a level of knowledge that led the state magistrate judge to determine that Matheney was competent to proceed with the post-conviction hearing:

Q. Mr. Matheney, do you know who I am?

* * * *

A. Magistrate Page.

Q. And do you know what my function is here?

A. Today you are presiding over this post conviction hearing....

Q. What is a post conviction hearing?

A. The attack of the legalities of your conviction, whether it was legal or illegal, to bring up issues that you feel that a defendant has a right to a new trial or sentence relief or whatever.

* * * *

Q. Your attorneys have filed a Petition for Post Conviction Relief, in which numerous grounds are alleged. Have you had an occasion to read this petition?
A. I read it a couple of times, and I just paid attention to the grounds that pertained to me. There's a lot of stuff in there, statutorily, that
they put in everybody's death penalty; and I didn't pay too much attention to, because they've already been ruled on over and over again.
Q. And the doctor said that you felt or seemed to indicate or give the impression that you felt that these issues were frivolous, because the only issue you feel is relevant is the one about [the alleged conspiracy between your wife and the prosecuting attorney at your trial] or this--
A. No. There's a lot of issues in there that I agree with. The only ones that I didn't agree with were the ones that they keep putting in everybody's issue, that the Supreme Court keeps turning down.

* * * *

Q. Well, the general challenges to the death penalty itself?
A. Right, yes.
Q. You feel that those are a waste of time because of the previous rulings of the Supreme Court?
A. Yeah. When I discussed them, they said, well, you never know when you're going to get a new Supreme Court; but a new Supreme Court don't come along often enough in this decade.
Q. Does that seem unreasonable for them to take that position? Have you not seen cases where a court will rule the same way over and over again; and then all of a sudden, along comes the same question and they say, well,
now that we think about it, we've changed our mind?
A. Yeah, I've seen cases like that. I just felt that there could have been more issues investigated and put in this than what was.... I believe during this whole thing that they want to investigate my childhood. Well, that has absolutely nothing--what I repeatedly told them, over and over again, is that what you should concentrate on is what had taken place, you know, the death of Lisa Bianco, and what caused it; and we should concentrate on investigating this particular, you know, period of time. Going back to my childhood 30 or 40 years ago, to me, doesn't seem like it's--you know, it's a waste of time, a waste of valuable time. I think time

could be better spent on investigating things about the incident itself.

*1037 After considering the relevant evidence presented and the arguments of counsel, the state court magistrate judge ruled that Matheney was competent to proceed with the post-conviction proceedings and then denied his petition for postconviction relief, stating:

The repeated pro se criticisms of the attorneys, the courts, and the rulings on the admissibility of evidence, all are in themselves sufficient to support the conclusion that the petitioner had always had a very clear understanding of the nature of the proceedings even if he did not agree with others' opinions of what should be presented in those proceedings.

(Emphasis added).

G. State Court Post-Conviction Appeal

On April 1, 1996, Public Defender Merryman appealed the state trial court's denial of Matheney's petition for postconviction relief. His 125 page appellate brief cited approximately 185 legal authorities in support of the following challenges to Matheney's conviction and sentence of death: (1) that the postconviction state court erred in failing to reach the merits of his ineffective assistance of counsel claim after deciding that the pleadings were insufficient; (2) that Matheney was denied a full and fair hearing because the state court magistrate judge was biased and forced him to proceed in a post- conviction hearing when he could not rationally consult with counsel; (3) that trial counsel provided Matheney ineffective assistance in failing to request a hearing on his competency to stand trial; (4) that the prosecutor committed misconduct in cross-examining a witness at trial with inadmissible statements made by Matheney; > [FN14] (5) that the jury instructions given at trial were fundamentally erroneous because they should have instructed the jury that *1038 Matheney was presumed to be insane under Indiana law; and (6) that the Indiana death penalty statute is unconstitutional.

> FN14. At trial, prosecutors had cross-examined Mike Scopelitis, an attorney who had represented Matheney in his divorce from Bianco, with a
series of questions focusing on whether Matheney had ever admitted to Scopelitis that he had threatened Bianco. The prosecution based its questions to Scopelitis on the content of tape-

recorded phone calls that had been excluded by the trial judge as inflammatory.

The Indiana Supreme Court denied Matheney any relief on appeal. > [FN15] See > Matheney v. State, 688 N.E.2d 883 (Ind.1997), cert. denied, > 525 U.S. 1148, 119 S.Ct. 1046, 143 L.Ed.2d 53 (1999). As the third argument contained in Matheney's Indiana state postconviction brief (that Skodinski, Lahey, and King were ineffective in failing to request a hearing on his competency to stand trial) is now before this court, we recount the Indiana Supreme Court's judgment. The Indiana Supreme Court held that defense counsel were not ineffective:

> FN15. The Indiana Supreme Court held: (1) Matheney was competent to stand trial; (2) he was not denied a fair trial as a result of the trial court's refusal to allow defense counsel to call a prosecutor as a defense witness on the issue of insanity; (3) that viewing the totality of the circumstances, no constitutional error was committed in the sentencing procedures. > Matheney v. State, 688 N.E.2d 883 (Ind.1997), cert. denied, > 525 U.S. 1148, 119 S.Ct. 1046, 143 L.Ed.2d 53 (1999).

Given the psychiatrists' determinations before trial, trial counsels' own opinions of Matheney's competency, and Dr. Berkson's earlier determination of Matheney's competency, trial counsel were not ineffective for failing to follow up their request for a determination of competency with a formal motion for a hearing on Matheney's competency.
> Id. at 899.

II. ISSUES

As stated previously, the federal district court denied Matheney's petition for a writ of habeas corpus, but granted him a certificate of appealability on two issues: (1) whether the state trial court should have found Matheney incompetent to stand trial or, in the alternative, should have granted an evidentiary hearing on the petitioner's competency to stand trial due to the problem surrounding Matheney's initial request for such a hearing; and (2) whether Matheney was denied effective assistance of counsel at the penalty and the sentencing phases of his trial. We also consider Matheney's related argument that (3) he was denied effective assistance of counsel because his trial counsel failed to pursue his potential incompetency to stand trial, thereby granting, in part, his

motion to expand the certificate of appealability. See > Porter v. Gramley, 112 F.3d 1308, 1312 (7th Cir.1997).

III. DISCUSSION

A. Standard for Determining Entitlement to Evidentiary Hearing

Matheney argues that the federal district court should not have denied him a writ of habeas corpus without at least holding an evidentiary hearing on his competency claims. Under > 28 U.S.C. S 2254(e)(2), added by the Antiterrorism and Effective Death Penalty Act (AEDPA), the failure to develop a factual record in the Indiana courts adequate to adjudicate his competency claims potentially bars Matheney from having such a hearing:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and *1039 convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

> [1] However, we have previously held that if the "fail[ure] to develop the factual basis of a claim in State court proceedings" can not be
attributed to something the petitioner "did or omitted," > Section 2254(e)(2) does not apply and it is then necessary to evaluate the request for an evidentiary hearing under pre-AEDPA standards. > Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir.1997). We cannot say that Matheney, (rather than his counsel) "failed" to establish a record sufficient to analyze his claims on appeal as the record clearly establishes that the majority of Matheney's attempts to file pleadings with the state courts were refused and not considered. More importantly, justice dictates that a hearing on whether counsel was constitutionally deficient in failing to establish Petitioner's competency to stand trial cannot be barred by counsel's failure to secure a hearing and develop a record--the very product of the alleged ineffectiveness. See also > Jones v. United States, 167 F.3d 1142, 1145 (7th Cir.1999). We thus consider whether

Matheney was entitled to receive an evidentiary hearing from the federal district court.

> [2] Under pre-AEDPA standards, a federal evidentiary hearing is required if (1) a habeas petitioner alleges facts which, if proved, would entitle him to relief and (2) the state courts--for reasons beyond the control of the petitioner-never considered the claim in a full and fair hearing. > Porter, 112 F.3d at 1317. The federal district court concluded that Matheney had not received a full and fair evidentiary hearing on his competency to stand trial from the Indiana state courts, > Matheney v. Anderson, 60 F.Supp.2d 846, 860 (N.D.Ind.1999), and we agree. In this respect we note that the Indiana Supreme Court did not discuss Matheney's due process and sua sponte competency to stand trial claims when it denied his petition for post-conviction relief. > Matheney v. State, 688 N.E.2d 883 (Ind.1997). Therefore, if Matheney has alleged facts in his petition that, if proved, entitle him to relief, he is entitled to an evidentiary hearing. > Townsend v. Sain, 372 U.S. 293, 312-13, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) overruled on other grounds, > Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992).

B. Matheney Claims Trial Counsel Provided Ineffective Assistance By Failing To Pursue The Initial Request For A Competency Hearing

Under the section of the Indiana Criminal Code at issue, an Indiana trial court is required to hold a competency hearing before submitting the case to the jury if, at any time, it has "reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of his defense." > Ind.Code S 35-36-3-1(a). Matheney argues that he received ineffective assistance of counsel because his defense team did not pursue his request for a hearing on his competency to stand trial prior to the commencement of trial. To establish a claim for ineffective assistance of counsel, a petitioner must establish that: (1) his attorney's performance fell below an objective standard of reasonableness; and (2) the attorney's deficient performance actually prejudiced the petitioner. > Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts deferentially review defense counsel's performance under the first prong, presuming reasonable judgment unless the factual record rebuts such a presumption. > Strickland, 466 U.S. at 689, 104 S.Ct. 2052. With regard to the second prong, the prejudice element, "[t]he defendant must show *1040 that there is

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." > Id.

> [3]> [4] From the record before us, we cannot authoritatively state that defense counsel performed reasonably under > Strickland's first prong when, for reasons unexplained, they allowed Matheney to proceed to trial without first obtaining the hearing on his competency to stand trial that they had previously filed with the court. The record is unclear, at best, as to why defense counsel, after filing a petition requesting that the trial court order independent psychiatrists to perform both a competency evaluation and a sanity examination, failed to follow through with the competency request when it became apparent that the trial court's order asked Drs. Batacan and Berkson for opinions solely related to the question of Matheney's sanity at the time of his offense. An adequate record is imperative to properly evaluate ineffective assistance claims. > United States v. Draves, 103 F.3d 1328, 1335 (7th Cir.1997). An evidentiary hearing must therefore be held to determine whether
trial counsel performed reasonably with respect to the issue of Matheney's competency to stand trial.

> [5] As to the second prong of > Strickland, Matheney argues that there is a reasonable probability he would have been found incompetent to stand trial and would not have been convicted if he had been allowed to proceed with a hearing on his competency to stand trial. A defendant who is tried and convicted of a crime while legally incompetent has been denied his due process right to a fair trial. > Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); > Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). The Supreme Court has held that if a state fails to observe its statutorily prescribed procedures aimed at testing whether a defendant is competent to stand trial, then that defendant's right to procedural due process has been violated. > Drope, 420 U.S. at 172, 95 S.Ct. 896. Certainly, a question has been raised as to Matheney's mental capacity to stand trial by Dr. Morrison's deposition testimony, which reads in pertinent part:

He [Matheney] was not rational. He continued through the time that I had seen him to believe that this was a conspiracy on the part of Michael Barnes and Lisa Bianco, that he would not be in the position if it had not been for them, that those tapes were the only

thing that would exonerate him. I think I was asked a question about a session where those were the primary thoughts that continued with him. He had no concept in my opinion of what was going on as far as his role in the trial was concerned. To him the only thing that was important and the only thing that this trial was going to do was to prove that he had not threatened Lisa Bianco because those tapes could be available.

* * * *

He was not capable of [rationally consulting with trial counsel] because the delusion that he maintained interfered with any ability to look at the reality of what he needed to go through as far as the trial was concerned, what the charges were. Everything to him remained and remains a conspiracy. (emphasis added).

Based upon the legitimate questions raised in the record relating to Matheney's competency to stand trial, we are of the opinion that Matheney was entitled to and should have received an evidentiary hearing on his petition. We thus remand Alan Matheney's case to the district court to hold an evidentiary hearing on three issues raised in his appellate brief surrounding his competency to stand trial: (1) whether *1041 Matheney was competent to stand trial in 1990; (2) whether Matheney's counsel were ineffective when they failed to pursue the initial request for a competency hearing; and (3) whether the state trial court was obligated to hold a competency hearing sua sponte. See > Lewis v. Lane, 822 F.2d 703 (7th Cir.1987).

The district court will have access to the medical records from three doctors
(Berkson, Batacan, and Morrison) who examined Matheney in 1989, including, but not limited to, psychiatric evaluations both before and after the commission of his crimes. In addition, the district court has the testimony from Matheney's criminal defense counsel and civil counsel that is already in the record. Finally, as the district court enjoys broad discretion in fashioning the scope of the hearing, > Wright v. Gramley, 125 F.3d 1038, 1044 (7th Cir.1997), it may well desire to consider any additional information that would assist the court.> [FN16]

> FN16. For example, the district court may decide that additional psychiatric analysis will be helpful to its decision. > United States v. Franzen, 686 F.2d 1238, 1247 (7th Cir.1982) (noting that habeas petitioner's "possible lack of fitness appears to be of a permanent

rather than transitory nature; therefore further medical or psychiatric testing may be relevant.").

C. Petitioner Claims Trial Counsel Provided Ineffective Assistance At The Sentencing Phase Of His Trial By Failing to Present Additional Evidence That Petitioner's Alleged Mental Illness Was A Mitigating Factor.

Matheney also claims that during the sentencing phase of his trial, his attorneys failed to present evidence that he suffered from a "mental disease or defect" that prevented him from controlling his conduct at the time of the murder, and that this failure denied Matheney effective assistance of counsel. As with any allegation of ineffective assistance of counsel, we review Matheney's claim under the two-prong test of > Strickland. As recently determined by the United States Supreme Court, we can only grant Matheney a writ of habeas corpus on this issue if we find that the Indiana Supreme Court's rejection of his claim was either "contrary to ... or involved an unreasonable application of" the performance and prejudice rules set out in Strickland. > Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000). In other words, "we must determine that the state court decision was both incorrect and unreasonable before we can issue a writ of habeas corpus." > Washington v. Smith, 219 F.3d 620, 628 (7th Cir.2000). Under > Strickland, a petitioner must establish that his counsel's performance was deficient and that the petitioner was prejudiced by counsel's substandard performance. The petitioner "bears a heavy burden when seeking to establish an ineffective assistance of counsel claim." > Drake v. Clark, 14 F.3d 351, 355 (7th Cir.1994).

Matheney concedes that during the sentencing phase of the trial, his attorneys argued to the jury that he was suffering from a mental disease or defect that rendered him unable to conform his conduct to the requirements of the law. His attorneys also urged the jury to consider this to be a factor weighing against recommending imposition of the death penalty. However, Matheney argues that he was prejudiced when his counsel failed to present "readily available evidence that, at the time of the crime, [Matheney] was 'grossly psychotic' " and unable to conform his conduct to the requirements of the law. The "readily available evidence" Matheney points to is testimony from Dr. Helen Morrison regarding the specific elements of the "inability to conform" death penalty mitigator. Matheney's ineffective

assistance *1042 of counsel at sentencing claim argues that if such testimony from Dr. Morrison had been presented, there is a reasonable probability that the jury and judge would have reached a different conclusion as to whether imposition of the death penalty was appropriate. We disagree, and hold that the trial judge's stated rationale for choosing to give little or no weight to the "inability to conform" death penalty mitigator precludes a reasonable probability that additional testimony from Dr. Morrison could have had an effect on the judge's decision to impose the death penalty. Matheney was therefore not prejudiced by any arguable deficiency by counsel in this regard, and we affirm the district court's decision on this issue.

As discussed previously, to establish a claim for ineffective assistance of counsel, Matheney must demonstrate that: (1) his attorneys' performance at sentencing fell below an objective standard of reasonableness; and (2) his attorneys' deficient performance actually prejudiced him. > Strickland, 466 U.S. at 687, 104 S.Ct. 2052. With respect to the second, or "prejudice" prong of the > Strickland test, the defendant must demonstrate that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. > Strickland, 466 U.S. at 694, 104 S.Ct. 2052. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." > Id.

> [6] The second prong of the > Strickland test has been applied to alleged errors of counsel committed during the sentencing phase of a capital case. As this court has previously held:

In the penalty phase of a capital case, to show prejudice the movant must demonstrate that "a reasonable probability exists that, but for counsel's substandard performance, the sentencer 'would have concluded that the balance of aggravating and mitigating factors did not warrant death.' "

> Foster v. Schomig, 223 F.3d 626, 636-37 (7th Cir.2000) (emphasis added); see also > Hall v. Washington, 106 F.3d 742, 751-52 (7th Cir.1997); > Strickland, 466 U.S. at 695, 104 S.Ct. 2052.

> [7]> [8] We need not determine the first, or "performance," prong of the > Strickland test, if we find that counsel's alleged deficiency did not prejudice the defendant. > Strickland, 466 U.S. at 697, 104 S.Ct. 2052; > Milone v. Camp, 22 F.3d 693, 701 (7th Cir.1994). We hold that Matheney cannot meet his burden of

establishing prejudice because the trial judge's stated rationale for imposing the death sentence precludes a reasonable probability that additional testimony from Dr. Morrison would have affected the court's sentencing decision. Thus it is not necessary for us to decide the "performance" prong of the > Strickland test and render an opinion on the objective reasonableness of counsel's decision not to call Dr. Morrison at the sentencing phase of the trial.

It is important to understand that under Indiana law, "the sentencer," as that phrase was used in > Strickland and > Hall, refers exclusively to the trial judge, and not the jury. While Indiana law provides for a jury recommendation on the appropriateness of the death penalty, the trial judge has the exclusive power to impose sentence, and is under no obligation to heed, or give substantial weight to, the jury's recommendation. > Ind.Code S 35-50-2-9(e).

Indiana law is clear on this point. Even if a jury has recommended imposition of the death penalty, the trial judge is still required to independently weigh the evidence and reach a "separate conclusion":

[A]fter any jury recommendation pursuant to the death penalty statute, the trial court as trier of fact must independently *1043 determine the existence of aggravators and mitigators, weigh them, consider the recommendation of the jury, and come to a separate conclusion as to whether or not to impose the death penalty.

> Kennedy v. State, 578 N.E.2d 633, 637 (Ind.1991), cert. denied, > 503 U.S. 921, 112 S.Ct. 1299, 117 L.Ed.2d 521 (emphasis added).

In Indiana, however, unlike Mississippi, the jury does not have the ultimate power of decision. The jury makes a recommendation to the judge about whether or not to impose the death penalty, but the judge is not required to follow the recommendation--it is his decision to make, not the jury's.... In Indiana, the sentencing judge must give due consideration to the jury's recommendation, but he need not give it any particular weight.

> Fleenor v. Anderson, 171 F.3d 1096, 1098 (7th Cir.1999) (emphasis added).

Thus, to prevail on his ineffective assistance at sentencing claim, Matheney is required to demonstrate that but for counsel's decision not to call Dr. Morrison to the stand, there is a reasonable probability that the trial judge (not the jury) would have found that the balance of aggravating and mitigating factors did not warrant

imposition of the death penalty. As we shall discuss below, the trial judge's articulated reasons for imposing the death penalty lead us to the conclusion that there is no reasonable probability that any additional testimony from Dr. Morrison could have affected Matheney's ultimate sentence.

1. The Legal Standards

The elements of the Indiana insanity defense are slightly different than those of the "inability to conform" sentencing mitigator. However, for purposes of this case it is important to focus on the similarities between the two standards: Both require proof that the defendant suffered from a "mentaldisease or defect." Indiana's insanity defense statute provides as follows:

A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.

> Ind.Code S 35-41-3-6(a).

As noted previously, Indiana's "inability to conform" death penalty mitigator states that the court may consider the following as mitigation against imposition of the death penalty:

The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or of intoxication.

> Ind.Code S 35-50-2-9(c)(6).

Both statutes require a defendant to make the threshold showing of the existence of a mental disease or defect, although the required degree of volitional impairment resulting from the disease or defect differs under the two standards. Obviously, if a defendant is unable to establish that he suffered from a mental disease or defect at the time of the crime, he cannot establish either an insanity defense or the death penalty mitigator. A finding that a defendant did not suffer from a mental disease or defect precludes the application of both, or either, of these statutes.

2. The Opinions of the Doctors

During the guilt phase of the trial, the two independent expert witnesses disagreed with Dr. Morrison on the issue of whether Matheney suffered from a "mental disease or defect" at the time of the murder. Dr. Morrison opined that at the time Matheney murdered his ex-wife, he *1044 was suffering from a personality

disorder that was consistent with the existence of a "mental disease." > [FN17]

> FN17. The majority is perplexed by the dissent's insistence that Dr. Morrison was not properly prepared by defense counsel to testify at trial. If, in fact, Dr. Morrison's potential testimony at sentencing regarding Matheney's mental condition would have had the substantial impact that the dissent attempts to ascribe to it, we fail to understand how she could have been unprepared to testify. Moreover, simply asserting that defense counsel did not spend sufficient time with a witness prior to trial is insufficient to maintain a claim for ineffective assistance of counsel. > United States v. Olson, 846 F.2d 1103, 1108 (7th Cir.1988). As we noted in > Olson, an experienced attorney can accomplish far more in a single conference with a witness than a neophyte lawyer can get out of several. > Id.

In any event, whether or not defense counsel properly prepared Dr. Morrison to testify at sentencing is not relevant to our analysis because we find that her opinion, even if it had been presented as the dissent characterizes it, would not have altered the trial judge's decision to impose the death penalty. After Dr. Morrison testified during the guilt phase of the trial, the trial judge was fully aware of her opinion that Matheney was suffering from a mental disease or defect at the time of the murder. The judge weighed that opinion against the contrary opinions of Drs. Batacan and Berkson and chose to give greater credence to the opinion of the court-appointed psychiatrists. The judge's sentencing decision also carefully weighed and considered all the testimony presented by law enforcement personnel regarding the nature of the crime and the entire criminal investigation.

Dr. Morrison's opinion was diametrically opposed to that of the two independent court-appointed psychiatrists who also testified during the guilt phase of the trial. Both Drs. Batacan and Berkson--appointed to serve as neutral experts for the court--opined that Matheney was not suffering from a mental disease or defect at the time of the murder. Both doctors gave unequivocal testimony on this issue. Dr. Batacan testified as follows:

Q: Okay, let me ask you the next question in sequence, then. Did you, as a result of questioning the defendant, Alan L. Matheney, observe any symptoms of

mental disease or defect?

A: No, your Honor, I did not.

Q: Are you able to, as a normal course, when a person does have symptoms of mental disease or defect, are you able to detect that by the method which you've outlined to us today?

A: Yes, your honor.

This opinion was reiterated in Dr. Batacan's written report, which stated that Matheney was not suffering from any "mental disease or defect, either at the time of the interviews or during the murder of his ex-wife." (emphasis added). As stated in his report, Dr. Batacan's opinion stems from his interviews with Matheney:

He has an intact memory for both remote and recent events. He is fully oriented to time, place, person and specific situations. He denies experiencing unrealistic ideas and feelings. He has not experienced any distorted interpretation and perception of reality, such as hallucinations and delusions. His feelings of being aggrieved and beliefs of being unjustly [treated] are very real to him. His affect is appropriate. He does not show any signs and symptoms of mental disease or mental defect now nor during the event in question. (emphasis added).

Dr. Batacan's conclusion that Matheney never suffered from a mental disease or defect was shared by Dr. Berkson. The second independent expert testified as follows:

*1045 Q: Are you able to discern symptoms of mental disease or defect by questioning a subject like that?

A: Yes, sir.

Q: Did you, as a result of your examination, discover any symptoms of mental disease or defect in Mr. Matheney?

A: No, sir, I did not.

In his written report to the court, Dr. Berkson confirmed his conclusion that "Alan Matheney did not suffer from a mental disease or defect ... at the time of the offense." > [FN18]

> FN18. The dissent's quotation from Dr. Berkson's trial testimony is taken out of context. Dr. Berkson did not merely testify that Matheney did not suffer from a mental disease that rendered him incapable of distinguishing right from wrong. Dr. Berkson testified that at the time the murder was committed, Matheney did not suffer from any mental disease or defect at all.

3. The Trial Judge's Sentencing Decision

Bearing in mind the applicable legal standards and the content of the three psychiatrists' trial testimony regarding the existence of a mental disease or
defect, we turn now to the trial judge's sentencing decision. For purposes of Matheney's ineffective assistance at sentencing claim, a crucial consideration is the rationale given by the judge for not giving weight to the "failure to conform" mitigator. Significantly, the record does not reflect a finding by the judge that Matheney had failed to submit convincing evidence that he was unable to conform his conduct to the requirements of the law (the omitted sentencing testimony on which the dissent relies). Indeed, it was not necessary for the judge to reach that issue once he chose to give no credence to Dr. Morrison's threshold premise that Matheney suffered from a mental disease. The judge's sentencing decision correctly makes no distinction between a diagnosis of "mental disease or defect" offered in support of the insanity defense and one offered in support of the death penalty mitigator, as the element is a prerequisite to the application of both statutes. The judge's sentencing decision implicitly recognizes that it makes no difference when Dr. Morrison's opinion on the existence of a mental disease was offered--during the guilt phase of the trial, the sentencing phase, or both. The rejection of this opinion for one purpose is a rejection of the opinion for both purposes.

At sentencing, the court identified and discussed each of the mitigating factors it considered. With respect to the "failure to conform" mitigator, the court stated the following on the record:

6. Standard: The defendant's capacity to appreciate the criminality of the
defendant's conduct or to conform the conduct to the requirements of the law was substantially impaired as a result of mental disease or did he [sic] defect or of intoxication. Facts: This mitigating factor is the old insanity defense since repealed. It's definition contains the cognitional function as well as the volitional function of the mind. Since it has not been repealed, it will be considered as it presently exists. The defense expert, Dr. Morrison, offered a diseased mind diagnosis rejected by the jury. Mr. Matheney has proven to be aware of the criminal justice system including methods to manipulate it. The Court concurs with Dr. Batacan and Dr. Berkson that the defendant has been feigning symptoms of mental illness. This defense was rejected by the jury. However, that does not dispose of the issue. It may be considered a mitigating factor though not rising to the level of a defense. *1046

It should also be noted here that the verdict form in Phase I of guilty but mentally ill was not selected by the jury. The jury, as well as the Court, has concluded that mental disease or defect was nonexistent in this case. Neither was the defendant acting under an irresistible impulse. He had been planning this murder for some time. He had solicited others in prison to kill Mrs. Bianco. These plans, of course, proved unsuccessful. There was no evidence that he had been drinking or on drugs.

(emphasis added).

As the preceding quote from the transcript makes clear, the trial judge

thoroughly considered all the evidence and the opinions offered by the medical experts and chose to believe, or give greater weight to, the opinions of Drs. Batacan and Berkson that Matheney was not suffering from any mental disease or defect at the time of his fatal assault on his ex-wife. It is not our role to second-guess a credibility determination made by an experienced trial judge for purposes of sentencing. > United States v. Tolson, 988 F.2d 1494, 1497 (7th Cir.1993). The judge's decision to reject Dr. Morrison's diagnosis is critically important because the existence of a mental disease or defect is the element common to both the insanity defense and the "inability to conform" death penalty mitigator. A failure to convince the jury or judge that a defendant is suffering from a mental disease or defect precludes application of both the insanity defense and the death penalty mitigator, and this is what happened in Matheney's case. Had Dr. Morrison been recalled to the stand during the penalty phase of the trial, her opinion as to the existence of a mental disease or defect would obviously have been the same opinion she gave during the guilt phase of the trial. In light of this fact, and the judge's clearly enunciated reasoning for rejecting the mitigating factor, we are convinced that Matheney has failed to demonstrate a reasonable probability that additional testimony from Dr. Morrison would have led the trial judge to impose a sentence other than death.

This would be quite a different case had the trial judge based his sentencing decision on a conclusion that Matheney was suffering from a mental disease, but that Matheney had failed to produce evidence that the disease rendered him incapable of conforming his conduct to the requirements of the law. If that were the case, a credible argument could be advanced that additional testimony from Dr. Morrison might have affected the court's sentencing decision. As the record stands, the judge's rejection of the

existence of a mental disease or defect is determinative of this issue on appeal. The district court's decision must therefore be affirmed in this respect.

4. Aggravating Sentencing Factors

> [9] Alternatively, even if Dr. Morrison's testimony had been presented at sentencing, and even if the sentencing judge had for some reason given credence to her opinions on the second go-around, this alone does not establish a reasonable probability that Matheney would not have received the death penalty. Under Indiana law, the presence of one (or more than one) mitigating factor does not preclude imposition of the death penalty. Rather, the statutory aggravating factors are weighed against the mitigating factors, and the resulting balance determines the appropriateness of the death penalty. > Kennedy, 578 N.E.2d at 637; see also > Foster, 223 F.3d at 637. The majority disagrees with the dissent's conclusion that evidence of the aggravating factors was "not strong." We are convinced that the existence of aggravating factors was more than sufficient to uphold imposition of the death penalty even in the face of testimony *1047 that Dr. Morrison might have presented in the sentencing phase of the trial.

a. Lying-in-Wait Aggravator

> [10] The dissent characterizes the evidence supporting the "lying-in-wait" aggravator as "weak at best," but this view is not supported by the record. Indeed, the dissent offers no explanation for its position that the evidence was "weak," other than to cite a dissenting opinion from one justice on the Indiana Supreme Court out of the five who heard the case. The majority interprets the fact that a majority of the Indiana Supreme Court found the evidence of aggravating factors to be sufficient to uphold the sentence to be testament to the strength of that evidence rather than its "weakness," and we are at a loss to understand how the dissent can view it in any other fashion. The totality of the evidence paints Matheney as a cold, calculating killer--one clear-headed enough to scheme and plan the fatal act. The record demonstrates that: (1) Matheney parked his vehicle in a parking lot near an alley behind Bianco's house, a full city block away, despite the fact that there was available parking in close proximity to the home; and (2) Matheney approached the home not via the front door or the city street, but rather by approaching from the rear, walking down an alley and through a backyard secluded by a dense growth of bushes and trees, a large wooden gate, and a garage. These facts

were not contested by Matheney at trial, and they obviously lend much credence to the prosecution's theory that Matheney's objective was to surprise Bianco and violently assault her while she remained in an off-guard and vulnerable position. The Indiana Supreme Court summarized its opinion on this issue as follows:

It would be reasonable for the trier of fact to conclude that appellant had used a circuitous approach toward Bianco's house in order to conceal himself from her and that testimony regarding the amount of time involved tended to prove that appellant waited and watched until he could take Bianco by surprise. The evidence regarding his use of a deadly weapon was indicative of his intent to kill. The evidence was sufficient to support the finding that this aggravating factor was proven beyond a reasonable doubt.

> Matheney, 583 N.E.2d at 1208-09.

The prosecution convincingly established a time-line showing that: (1) Matheney went to Snider's home to obtain a weapon and left Snider's home with the shotgun at approximately 2 p.m.; and, (2) he did not break into Bianco's home until at least an hour later, despite the relative proximity of the two residences. From this time-line, and the evidence of Matheney's roundabout approach and entry into Bianco's home, it is reasonable to conclude (as the trial court did) that Matheney was "lying in wait" in Bianco's backyard in an effort to take her by surprise. See > Matheney, 583 N.E.2d at 1204-05.

In fact, as recognized in the dissent, throughout the long appellate history of this case, only Justice DeBruler alone of the five member Indiana Supreme Court was of the opinion that the evidence and time-line did not adequately support a finding that the "lying-in-wait" aggravator was proven beyond a reasonable doubt. Once again, the majority interprets the fact that only a single justice questioned the trial judge's decision on the lying-in-wait aggravator as a testament to the strength of that evidence.

b. Felony Murder Aggravator

> [11] The dissent takes the position that the intentional killing while committing a burglary aggravator should not have been be given much weight in the trial court's *1048 sentencing decision. In effect, the dissent is re- weighing the evidence and goes on to characterize the evidence supporting this aggravator as being "not as compelling in this case as in others." Once again, the dissent relies exclusively on the dissenting opinion of a single Justice of the five-member Indiana Supreme Court as support for the position that the felony murder aggravator is not "compelling" when the

burglary is accomplished for purposes of committing the murder, as opposed to a separate felony. Obviously, the majority of the Indiana Supreme Court did not agree with this position, nor do we. We agree with the Indiana Supreme Court that the felony murder aggravator applies to the very situation present in this case--forcible entry of a residence with the intent to commit murder. > Matheney, 583 N.E.2d
at 1207.

The testimony from witnesses, including Matheney's own young daughter, demonstrated that Matheney burst through the back door of Bianco's home and confronted his ex-wife in the presence of their daughter, while armed with the shotgun that he later used to bludgeon Bianco to death with such force that the weapon was literally smashed to pieces. See > Matheney, 583 N.E.2d at 1204-05. Matheney's violent assault and ultimate murder of Lisa Bianco was horrific in and of itself; the fact that it was accomplished by a forcible surprise attack in the home makes it all the more reprehensible, given the recognized importance of the "home as a sanctuary." See > Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1343 (7th Cir.1985); > Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

c. Balancing the Sentencing Factors

> [12]> [13] Under Indiana law, a sentencing judge is not permitted to consider evidence supporting a mitigating factor in isolation. Rather, the judge is obligated to balance the strength of such evidence against the facts supporting the aggravating factors. In light of the facts underscoring the brutal nature of this crime and its occurrence inside the supposed sanctuary of Bianco's home, we are not convinced that additional testimony from Dr. Morrison at sentencing, if it had been presented and believed, would have necessarily tipped the balance against imposition of the death penalty. As we noted in
> Foster:

Sentencing judges may not be impressed with the idea that to know the cause of viciousness is to excuse it; they may conclude instead that when violent behavior appears to be outside the defendant's power of control, capital punishment is appropriate to incapacitate.

> Foster, 223 F.3d at 637.

We must remember that the judge heard substantial evidence demonstrating Matheney's extensive planning and deliberate execution of the fatal assault. The judge also heard testimony from

the arresting officer that Matheney was calm, relaxed, and displayed no nervousness or distress when he turned himself in approximately two hours after committing the murder. Rather, Matheney calmly informed the officer that he assumed his ex-wife had died as a result of his assault. The officer testified that between the time of the murder and the time he turned himself in, Matheney's primary concern was with purchasing cigarettes to take with him to jail. These facts, demonstrating the deliberate, well-planned and fully premeditated nature of the murder, were uncontested by Matheney at trial. The judge also heard evidence concerning the extreme violence of the murder; how the shotgun was smashed into pieces by the force of Matheney's blows to Bianco's body. In light of the aggravating circumstances set forth in this record, we certainly cannot agree that there is a reasonable *1049 probability that the presence of a single mitigating factor would necessarily have staved off imposition of the death penalty. For this additional reason, we are convinced that Matheney was not prejudiced, even if one accepts the premise that his counsel did not perform reasonably at sentencing.

IV. CONCLUSION

We affirm the district court's decision that the petitioner's ineffective assistance of counsel claim with respect to the sentencing phase of his trial is without merit. We also hold that the petitioner is entitled to an evidentiary hearing in the district court in order that he might be given the opportunity to offer evidence to develop the factual basis of his claim surrounding his competency to stand trial. This case is REMANDED to the district court with INSTRUCTIONS to proceed with an evidentiary hearing consistent with this opinion.

> ILANA DIAMOND ROVNER, Circuit Judge, concurring in part, dissenting in part.

I join in the majority's thorough opinion regarding the issue of Matheney's competence to stand trial. I write separately only because I would reverse the district court on the sentencing issue as well because Matheney's trial attorney failed to present critical mitigating evidence at the sentencing hearing.

A defendant's mental disease or defect is relevant both to an insanity defense and to the death penalty determination, but the standards are different in those two contexts. The insanity defense does not apply if a defendant is able to appreciate the wrongfulness

of his conduct, even if the defendant is unable to conform his conduct to the requirements of the law. > Matheney v. State, 688 N.E.2d 883, 898 (Ind.1997), citing > Ind.Code S 35-41-3-6 (West 1986). In contrast, it is a mitigating factor at sentencing that a defendant was unable to conform his conduct to the requirements of the law. Id., citing > Ind.Code S 35-50-2-9(c)(6) (West Supp.1996). Therefore, a jury's rejection of the insanity defense at trial does not preclude the application of that mitigating factor at sentencing.

Matheney's counsel chose to argue that mitigating factor at the sentencing hearing, but failed to produce the critical evidence supporting it. Matheney's counsel argued that, even if Matheney was not able to prove insanity because he could distinguish right from wrong, he nevertheless could establish the presence of the mitigating factor because he was unable to conform his conduct to the requirements of the law. As the majority recognizes, Matheney's counsel did not make a tactical decision to forego that mitigating factor in favor of others, but affirmatively argued that factor. His counsel failed, however, to introduce any psychiatric testimony establishing that Matheney was unable to conform his conduct to the requirements of the law. At a hearing on Matheney's petition for post-conviction relief, Dr. Morrison testified that Matheney understood that his conduct was wrongful, but that his actions at the time of the murder were defined by the delusions he experienced, rendering him incapable of conforming his behavior to the requirements of the law. In other words, her testimony would have been consistent with the jury verdict rejecting the insanity defense, but would have established the mitigating factor based on his mental illness. Matheney's counsel failed to present that testimony--or any testimony--to support the argument that the mitigating factor was met. That failure may be explained by Dr. Morrison's testimony that defense counsel spent only one hour with her preparing her for the deposition, and no time subsequent to that preparing her to testify at trial. Defense counsel never even described the standards for insanity or the mitigating factors under Indiana law, and *1050 never asked her at trial or sentencing the critical questions of whether Matheney could appreciate the wrongfulness of his conduct and conform his conduct to the requirements of the law. That lack of preparation by trial counsel is telling given that Matheney's defense was insanity, Dr. Morrison was the key psychiatric witness, and the strongest factor mitigating against the death penalty was his mental illness.

Because Matheney's counsel failed to present Dr. Morrison's testimony at
sentencing, and failed to elicit that critical testimony at trial which then could have been considered by the jury at sentencing, the jury had no basis upon which to accept the defense argument in mitigation. Where the defense counsel argues a mitigating factor but fails to present any evidence whatsoever to establish that factor even though such evidence is readily available, we cannot excuse that conduct as a tactical decision. We cannot assume that the jury's rejection of the insanity defense would have doomed a defense argument at sentencing based on mental illness, given that the standards were different and Dr. Morrison's testimony would have been consistent with the jury's verdict. See, e.g., > Eddmonds v. Peters, 93 F.3d 1307, 1325 (7th Cir.1996) (Flaum, J., and Rovner, J., concurring) ("A determination of sanity [ ] cannot be a sufficient reason to forego inquiry into psychological problems for mitigation purposes.") citing > Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir.1988), and > Loyd v. Whitley, 977 F.2d 149, 156-57 (5th Cir.1992).

The failure to present Dr. Morrison's testimony was prejudicial because it was by far the strongest mitigation evidence Matheney possessed. Dr. Morrison's testimony would have provided a perspective on Matheney that integrated the evidence of mental disease and defect provided at trial but harmonized with the jury's rejection of the insanity defense. Absent that testimony, the jury had no reason to distinguish the insanity defense from the mitigating factor. Therefore, the testimony by Dr. Morrison was pivotal to the strongest mitigating factor available to Matheney. His defense counsel chose to argue for that mitigating factor, but never presented the psychiatric testimony that would provide the necessary foundation for it.

Moreover, although Drs. Batacan and Berkson did not appear to agree with Dr. Morrison's analysis, defense counsel had many avenues available to either discredit or reconcile their opinions. For instance, Dr. Batacan testified that in order for a condition to constitute a "mental disease or defect" by the legal definition, it must include hallucinations. In fact, he stated that even if a person experienced delusions, depression, or other symptoms, "in the absence of hallucination, there is no mental disease." Tr. at 1539-40. Because there was no evidence that Matheney experienced hallucinations, Dr. Batacan concluded that he did not possess a mental disease or defect. Even Dr. Berkson agreed that Dr.

Batacan's interpretation of mental disease or defect was wrong. Given Dr. Batacan's fundamental, and rather stunning, misunderstanding of the term "mental disease or defect," his opinion was incorrect as a matter of law, and thus entitled to no consideration.

Dr. Berkson's testimony did not suffer from a similar fundamental error, but it was not without its limits. In both his written report and his trial testimony, Dr. Berkson concluded that Matheney "did not suffer from a mental
disease or defect that would render him incapable of distinguishing right from wrong." That precluded the insanity defense, but was perfectly consistent with Dr. Morrison's opinion. In fact, at the post-conviction deposition, Dr. Berkson stated that his opinion was not *1051 inconsistent with Dr. Morrison's. Dr. Berkson further attested at that deposition that Matheney suffered from a mental disease--paranoid personality--which affected Matheney's behavior but not his ability to appreciate the wrongfulness of the offense, and thus did not rise to the level of legal insanity. Dr. Berkson's statements at the post-conviction deposition make clear that if defense counsel had more thoroughly explored his opinion, they could have elicited testimony that would have been helpful at sentencing and that would have been consistent with Dr. Morrison's opinion. In fact, Dr. Berkson in his written report prior to trial left open the possibility of altering his opinion if provided additional evidence by defense counsel. In that report and at the post-conviction deposition, Dr. Berkson stated that he had called Matheney's attorneys seeking further information, but had no contact with those attorneys after that time and never received further information from them. Therefore, Dr. Berkson's opinion, properly developed by defense counsel, would have been consistent with Dr. Morrison's opinion, and would have significantly impacted the determination by the judge and the jury of whether Matheney suffered from a mental disease or defect. Accordingly, even in light of the opinions of Drs. Batacan and Berkson, Dr. Morrison's opinion could have been strong evidence of the mitigating factor.

The existence of a mental disease or defect that rendered him incapable of conforming his conduct to the law would have been a significant mitigating factor, and there is a reasonable probability that it would have altered the jury's recommendation--particularly because the aggravating factors were not strong here. The two aggravating factors were that the offense was committed (1) by

lying in wait and (2) during the course of a burglary. Although the majority devotes much time to discussing the brutality of the crime, a point I do not question and with which I am in agreement, it is not one of the aggravating factors that are available to the jury, and therefore cannot be a part of this analysis. We are limited to considering the two identified aggravating factors.

The lying-in-wait factor was based upon evidence that he approached the home from the rear, and that the timeline established by the prosecution allowed for a conclusion that he waited behind the house before entering. That evidence was weak at best, and a dissenting justice of the Indiana Supreme Court declared that there was no basis to find that factor. > Matheney v. State, 583 N.E.2d 1202, 1210 (Ind.1992) (DeBruler, J. dissenting). The burglaryfactor was premised on Matheney's actions in breaking through the door and entering the home in search of his wife. Burglary requires a forcible entry with the intent to commit a felony, but there was no intent to commit a separate felony here such as robbery or rape, which would elevate the murder to another level by adding an additional intended felony. Instead, the intent for the burglary was the intent to commit the murder, the same intent necessarily found for the murder charge itself. Therefore, the aggravating factor of the burglary is present here, but is not as compelling in this case as in others, because it did not encompass an intent to commit a separate felony. See > id. at 1210 (DeBruler, J. dissenting) ("where the intent of the burglary is the intent to kill, the weight of the aggravator is greatly diminished, for the mind has formed but a single felonious intent.") Thus, the jury would have been required to balance the evidence that in committing the murder he may have waited in the yard for a short time and then forcibly entered the home, against evidence that his mental illness rendered him incapable of conforming his conduct to the requirements of the law. On those facts, I believe *1052 that there is a reasonable probability--that is, one sufficient to undermine confidence in the outcome--that but for the failure to present that mitigating evidence, the result would have been different. See > Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1513-14, 146 L.Ed.2d 389 (2000). I would

therefore conclude that Matheney received ineffective assistance of counsel at sentencing, and would reverse and remand on that issue as well.

EXHIBIT D

United States District Court,
N.D. Indiana,
South Bend Division.
Alan L. MATHENEY, Petitioner,
v.
Ron ANDERSON, Superintendent, Respondent.
No. 3:98 CV 183 AS.
July 30, 1999.

Following affirmance of his murder conviction and death sentence, > 583 NE2d 1202, defendant filed petition for writ of habeas corpus. The District Court, Allen Sharp, J., held that: (1) defendant was competent to stand trial; (2) defendant was not denied a fair trial as result of trial court's refusal to permit defense counsel to call a prosecutor as a defense witness on issue of defendant's sanity; (3) no constitutional error was committed in the totality of the sentencing procedures of trial judge; and (4) reasonable trier of fact could have found beyond a reasonable doubt that the state established the elements for "lying in wait" aggravating circumstance.

Petition denied.

West Headnotes

> [1] > KeyCite this headnote

> 197 Habeas Corpus
> 197II Grounds for Relief; Illegality of Restraint
> 197II(A) Ground and Nature of Restraint
> 197k447 k. Deprivation of Fundamental or Constitutional Rights; Miscarriage of Justice.

Federal habeas court must ensure that the state criminal conviction was not achieved at the expense of the petitioner's constitutional rights. > 28 U.S.C.A. S 2254.

> [2] > KeyCite this headnote

> 197 Habeas Corpus
> 197I In General
> 197I(D) Federal Court Review of Petitions by State Prisoners

> 197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
> 197k380 Sufficiency of Presentation; Fair Presentation
> 197k383 k. Necessity and Sufficiency of Identification of Federal Constitutional Issue.

In order to preserve claim for habeas review, a habeas petitioner must only fairly alert the state court of the federal constitutional grounds for his claim. > 28 U.S.C.A. S 2254.

> [3] > KeyCite this headnote

> 197 Habeas Corpus
> 197I In General
> 197I(D) Federal Court Review of Petitions by State Prisoners
> 197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
> 197k380 Sufficiency of Presentation; Fair Presentation
> 197k383 k. Necessity and Sufficiency of Identification of Federal Constitutional Issue.

Although petitioner's claims that his incompetency at trial violated his due process rights and that trial judge abridged his due process rights by failing to sua sponte hold a competency hearing, and his failure to do so were each the subject of one paragraph in a 125 page brief, petitioner properly raised the claims before the state court and therefore they were cognizable in federal habeas proceeding. > U.S.C.A. Const.Amend. 14; > 28 U.S.C.A. S 2254.

> [4] > KeyCite this headnote

> 257A Mental Health
> 257AIV Disabilities and Privileges of Mentally Disordered Persons
> 257AIV(E) Crimes
> 257Ak432 k. Mental Disorder at Time of Trial.

Relevant factors to be considered in assessing the issue of competency to stand trial are a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to

stand trial; there must be some manifestation, some conduct, on the defendant's part to trigger a reasonable doubt of his competency.

> [5] > KeyCite this headnote

> 110 Criminal Law
> 110XX Trial
> 110XX(A) Preliminary Proceedings
> 110k623 Separate Trial or Hearing on Issue of Insanity, Incapacity, or Incompetency
> 110k625.15 k. Evidence.

As part of making objective inquiry as to a defendant's competency to stand trial, a court may consider the defendant's attorney's representations concerning the defendant's competency.

> [6] > KeyCite this headnote

> 92 Constitutional Law
> 92XII Due Process of Law
> 92k256 Criminal Prosecutions
> 92k268.2 Disadvantaged Persons, Counsel and Trial
> 92k268.2(2) k. Incompetents or Psychopaths; Determination of Sanity.

> 110 Criminal Law
> 110XX Trial
> 110XX(A) Preliminary Proceedings
> 110k623 Separate Trial or Hearing on Issue of Insanity, Incapacity, or Incompetency
> 110k625.10 Preliminary Proceedings
> 110k625.10(4) k. Initiation by Prosecution or Sua Sponte by Court; Absence of Request.

In view of opinions of medical experts and defendant's attorney's, defendant, who understood the facts of the situation and the consequences of trial and
sentencing and who provided some assistance to his counsel, was competent to stand trial; thus, his due process right to be tried as a competent individual was not violated, trial judge's failure to sua

sponte order a competency hearing was not a violation of his due process rights, and his attorneys' failure to raise the issue did not prejudice him and thus was not violative of his Sixth Amendment rights to effective assistance of counsel. > U.S.C.A. Const.Amends. 6, > 14.

> [7] > KeyCite this headnote

> 197 Habeas Corpus
> 197II Grounds for Relief; Illegality of Restraint
> 197II(B) Particular Defects and Authority for Detention in General
> 197k495 k. Witnesses; Examination.

Trial court's refusal to permit defense counsel to call a prosecutor as a defense witness on issue of defendant's sanity did not deny defendant a fair trial, and thus did not warrant habeas relief, where there was an abundance of evidence on the insanity-mental health issue.

> [8] > KeyCite this headnote

> 197 Habeas Corpus
> 197II Grounds for Relief; Illegality of Restraint
> 197II(B) Particular Defects and Authority for Detention in General
> 197k498 k. Instructions.

Indiana Supreme Court's decision upholding trial court's refusal to instruct the jury as to the lesser included offense of voluntary manslaughter in murder trial based on insufficiency of evidence from which to give a lesser-included offense instruction was not an unreasonable application of federal law so as to warrant habeas relief.

> [9] > KeyCite this headnote

> 197 Habeas Corpus
> 197II Grounds for Relief; Illegality of Restraint

> 197II(B) Particular Defects and Authority for Detention in General
> 197k503 Judgment, Sentence, or Order
> 197k505 k. Procedural Errors.

No constitutional error was committed in the totality of the sentencing procedures of trial judge, who, without notice to defendant or his counsel, received and reviewed a psychological questionnaire pertaining to defendant prior to sentencing him to death. > U.S.C.A. Const.Amends. 8, > 14.

> [10] > KeyCite this headnote

> 110 Criminal Law
> 110XX Trial
> 110XX(B) Course and Conduct of Trial in General
> 110k641 Counsel for Accused
> 110k641.13 Adequacy of Representation
> 110k641.13(2) Particular Cases and Problems
> 110k641.13(7) k. Post-Trial Procedure and Review.

Defendant in a capital criminal case is entitled to effective assistance of counsel in the penalty phase. > U.S.C.A. Const.Amend. 6.

> [11] > KeyCite this headnote

> 197 Habeas Corpus
> 197II Grounds for Relief; Illegality of Restraint
> 197II(B) Particular Defects and Authority for Detention in General
> 197k482 Counsel
> 197k486 Adequacy and Effectiveness of Counsel
> 197k486(5) k. Post-Trial Proceedings; Sentencing, Appeal, Etc.

Decision of the Indiana Supreme Court that defense counsel's failure to elicit additional testimony on mitigating factor from expert during sentencing phase of capital trial did not create a reasonable probability that the result of the proceeding would have

been different was not unreasonable; evidence was presented at trial to support mitigator, and counsel did argue the presence of that evidence to the jury in his closing argument in the penalty phase.

> [12] > KeyCite this headnote

> 350H Sentencing and Punishment
> 350HVIII The Death Penalty
> 350HVIII(D) Factors Related to Offense
> 350Hk1676 k. Planning, Premeditation, and Calculation. (Formerly 203k357(4))

Reasonable trier of fact could have found beyond a reasonable doubt that the state established the elements for "lying in wait" aggravating circumstance in capital murder trial; it was reasonable to conclude from the evidence that defendant used a circuitous route toward the victim's house in order to conceal himself from her.

> [13] > KeyCite this headnote

> 197 Habeas Corpus
> 197I In General
> 197I(D) Federal Court Review of Petitions by State Prisoners
> 197I(D)2 Particular Errors and Proceedings
> 197k332 Criminal Prosecutions
> 197k333 k. Mental Competency, Claims Relating To.

Claim that a defendant is incompetent to be executed must be presented to the state court, when execution is imminent prior to obtaining federal relief. > U.S.C.A. Const.Amend. 8.

*848 Marie F Donnelly, > Alan Freedman, Chicago, IL, for Alan L Matheney, petitioner.
> Andrew L Hedges, > Michael A Hurst, Indiana Attorney General, Indianapolis, IN, for Ron Anderson, Superintendent, respondent.
MEMORANDUM AND ORDER

> ALLEN SHARP, District Judge.

Petitioner, Alan Lehman Matheney, was convicted of murder in a state court trial conducted in South Bend, Indiana, and was sentenced to death by the judge conducting that trial upon the recommendation of the jury that heard the case. The within petition was filed by counsel in this Court on April 14, 1998 and oral argument was heard in South Bend, Indiana on July 9, 1998. This Court greatly appreciates the high degree of professional competence displayed by appointed counsel for this petitioner.

The extensive state record has been filed and examined by this Court under the mandates of > Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) and under the mandates of the Antiterrorism and Effective Death Penalty Act (AEDPA) > 28 U.S.C. S 2244(b). Immediate reference is made to the two decisions in this case by the Supreme Court of Indiana, namely > Matheney v. State, 583 N.E.2d 1202 (Ind.1992), cert. denied, > 504 U.S. 962, 112 S.Ct. 2320, 119 L.Ed.2d 238 (1992) and > Matheney v. State, 688 N.E.2d 883 (Ind.1997), cert. denied, > 525 U.S. 1148, 119 S.Ct. 1046, 143 L.Ed.2d 53 (1999). This petitioner is now confined on death row at the Indiana State Prison in Michigan City, Indiana in this district.

As a preliminary matter, this court notes that on July 21, 1999, this court received by fax two documents from attorney Alan Freedman, counsel for petitioner. Both documents were authored pro se by Matheney. The first is a motion to the Supreme Court of Indiana to allow Matheney to proceed pro se and to have attorneys Alan Freedman and Marie Donnelly removed as legal counsel. The second is a motion to this court to withdraw his appeals. The court notes that as of the date of this opinion, these documents have not been received directly from Matheney or filed in the official court file. Thus, the court will address the petition for writ of habeas corpus on the merits as presented by counsel.

I. Factual and Procedural Background

On and immediately before March 4, 1989, this petitioner was incarcerated in the Correctional Industrial Complex at Pendleton, Indiana, upon a sentence imposed in a court in St. Joseph County, Indiana on November 23, 1987, for battery upon Lisa Bianco, his former wife, and for confinement of his children > [FN1] . On March 4, 1989, the appropriate authorities of the Indiana Department of Corrections authorized this petitioner to have an

eight hour pass release from the Correctional Industrial *849 Complex at Pendleton,
Indiana. The pass was limited both as to time and locale and authorized only a trip to Indianapolis. Notwithstanding these limitations, the petitioner immediately drove to the South Bend area, went to the house of a friend, Rob Snider, changed clothes, removed an unloaded shotgun from that house and took it with him. Snider and the occupants of the house disclaim any knowledge of the petitioner removing the aforesaid unloaded shotgun. He then drove to an area in Mishawaka, Indiana, which, as every Hoosier geography student must know, is a side by side city municipality with South Bend. He parked near the house occupied by Lisa Bianco and broke into it through the back door. She ran from that house pursued by this petitioner, and the chase was witnessed by neighbors who saw it and testified about it. He caught Bianco and beat her to death with the shotgun, which broke into pieces. One observer confronted the petitioner, chased him to his car, which he got in and drove away. He soon thereafter surrendered to police authorities. The autopsy indicated that Bianco died as a result of trauma to the head from a blunt instrument.

> FN1. On his first unsupervised visitation with the minor children after his divorce from Bianco in June, 1985, Matheney took the children on July 3, 1985 and left the South Bend area, traveling to Windsor, Ontario, Canada, Washington D.C., and somewhere in North Carolina over a period of approximately six weeks. Eventually, Matheney made a phone call to the St. Joseph County Sheriff's Department, which call was traced, leading to his apprehension in North Carolina. This formed the basis of the confinement charge against him.

In the lengthy and complicated proceedings in the state court it does not appear that this petitioner ever seriously disputed the facts with regard to the killing of Lisa Bianco by him. He thus does not make a challenge to this federal habeas petition on the basis of factual or actual innocence. > Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). The total tactics with reference to the defense of this case are complicated and must be reviewed in some considerable detail, but it appears that the fundamental thrust of the defense was not to dispute the killing but to argue for some version of insanity. The centerpiece of his contentions for

paranoid delusional disorder was that his ex-wife, Lisa Bianco, and Michael Barnes, then the elected prosecuting attorney of St. Joseph County, Indiana, were having an affair and that his imprisonment at the Pendleton correctional facility was a part of a conspiracy between his ex-wife and the local prosecutor to keep him out of the way.

A two count information for murder and burglary was filed against this petitioner on March 7, 1989 and was amended on March 20, 1989 to include the presence of two aggravating circumstances for the purpose of imposing capital punishment. The initial charge was signed by Richard Bonne, a Mishawaka police officer, and the additional counts were signed by Prosecutor Michael Barnes. These charges were filed in the St. Joseph Superior Court in South Bend, Indiana, before the Honorable Jeanne J. Swartz (now Jordan). Judge Swartz appointed the Public Defender's Office to represent Matheney, and on March 14, 1989, Philip Skodinski entered his appearance as a public defender on behalf of Matheney. On March 21, 1989, Charles Lahey entered his additional appearance on behalf of Matheney. It is undisputed that neither of these attorneys had ever previously tried a capital murder trial.

On March 14, 1989, the date of his entry into the cause, Skodinski filed a notice of insanity defense and request for examination for purposes of determining competency to stand trial and sanity at the time of the offense. That motion was granted, and Judge Swartz appointed Drs. Myron Berkson and George Batacan to perform the mental examination. Although the reports of Drs. Berkson and Batacan were not a part of the record below either on direct appeal or on post-conviction relief, they have been presented to this court. Dr. Batacan's undated report does not address the question of competency for trial, but does opine that Matheney was sane at the time of the offense. Dr. Berkson's report, dated April 19, 1989, notes in its initial paragraph that the request for examination included both questions of sanity and competency, but his report only addresses the sanity issue, in which Dr. Berkson found Matheney

to be sane at the time of the offense. At his deposition on May 22, 1989, Dr. Berkson referred to a prior occasion when he had opined on *850 Matheney's competency in 1987, in which case he had found Matheney to be competent for his sentencing in the battery and confinement case. During the prosecutor's examination of Dr. Berkson at the deposition, Dr. Berkson mentioned that he had discussed the roles of the judge, prosecutor and defense counsel with reference to making a competency determination, but nowhere in the deposition did he proffer his opinion as to Matheney's competency in 1989.

On March 20, 1989, the state moved for a change of venue, which Matheney, by counsel, opposed. As the parties did not agree on the change of venue, Judge Swartz recused herself and provided a panel of St. Joseph County judges from which the parties could select a new judge. After the selection process, Judge William Whitman was assigned the case on March 27, 1989.

While the cause was before Judge Whitman, Matheney filed several pro se motions, including a motion for appointment of counsel on July 19, 1989, a motion for immediate hearing on motion for appointment of legal counsel on August 2, 1989, and a motion for change of venue on December 21, 1989. Matheney also sent letters directly to Judge Whitman, including a letter on August 7, 1989 which accompanied his August 2 motion and further asked the judge to recuse himself because Matheney wanted to call him as a witness. Shortly after that last motion, Matheney's attorneys filed a motion for change
of judge on December 28, 1989. Judge Whitman held a hearing on the pro se motion for change of venue and motion for change of judge on January 2, 1990. In that proceeding this petitioner told Judge Whitman that the case should be moved from St. Joseph County, Indiana because of the relationship between Lisa Bianco and Michael Barnes. He claimed that that relationship prevented him from securing competent counsel and expressed concern that defense witnesses might be threatened or harassed. He also claimed

that he had consulted with at least ten attorneys about the case. He also expressed concern about the wiretap on his family's telephone. He told Judge Whitman that an expert corroborated the phone tap and he complained about the police breaking into his relatives homes to steal evidence. After that hearing, Judge Whitman granted the motion for change of venue, and after the parties made their strikes against the list provided by Judge Whitman, the cause was transferred to the Lake County Superior Court on January 25, 1990. On that same day, attorneys Skodinski and Lahey filed a motion to withdraw as counsel due to their status as part-time public defenders.

Judge James Letsinger of the Lake County Superior Court took jurisdiction of the case on January 29, 1990, and on January 30, 1990, he denied the motion to withdraw filed by attorneys Skodinski and Lahey. However, he did appoint Scott L. King as local counsel on February 1, 1990, and King > [FN2] became lead counsel for Matheney.

> FN2. Scott L. King is certainly well known to this court as a criminal defense lawyer who is and was death penalty qualified under > Rule 24(B) of the Indiana Rules of Criminal Procedure. See e.g. > Drake v. State, 655 N.E.2d 574 (Ind.Ct.App.1995); > Chapman v. State, 650 N.E.2d 764 (Ind.Ct.App.1995); > Kiner v. State, 643 N.E.2d 950 (Ind.Ct.App.1994); > Stahl v. State, 616 N.E.2d 9 (Ind.1993); > Babin v. State, 609 N.E.2d 3 (Ind.Ct.App.1993); > Rouster v. State, 600 N.E.2d 1342 (Ind.1992); > Heiser v. State, 596 N.E.2d 965 (Ind.Ct.App.1992); > Demontigney v. State, 593 N.E.2d 1270 (Ind.Ct.App.1992); > Johnson v. State, 587 N.E.2d 138 (Ind.Ct.App.1992); > Maisonet v. State, 579 N.E.2d 660 (Ind.Ct.App.1991); > Carr v. State, 579 N.E.2d 663 (Ind.Ct.App.1991); > Fleming v. State, 579 N.E.2d 73 (Ind.1991); > Jackson v. State, 563 N.E.2d 1310 (Ind.Ct.App.1990); > Ceroni v. State, 559 N.E.2d 372 (Ind.Ct.App.1990); > Sheron v. State, 553 N.E.2d 1200

(Ind.1990); > Watkins v. State, 551 N.E.2d 1145 (Ind.1990); > Wesby v. State, 550 N.E.2d 321 (Ind.1990); > Terry v. State, 545 N.E.2d 831 (Ind.1989); > Kelley v. State, 543 N.E.2d 638 (Ind.1989); > Rocha v. State, 542 N.E.2d 190 (Ind.1989); > Minniefield v. State, 539 N.E.2d 464 (Ind.1989); > Nixon v. State, 539 N.E.2d 483 (Ind.Ct.App.1989); > Stinson v. State, 539 N.E.2d 33 (Ind.Ct.App.1989);
> Schneider v. State, 538 N.E.2d 13 (Ind.Ct.App.1989); > Wilson v. State, 537 N.E.2d 1185 (Ind.1989); > Adamov v. State, 536 N.E.2d 281 (Ind.1989); > Manuel v. State, 535 N.E.2d 1159 (Ind.1989); > Manley v. State, 535 N.E.2d 553 (Ind.1989); > Diggs v. State, 531 N.E.2d 461 (Ind.1988); > Long v. State, 529 N.E.2d 339 (Ind.1988); > Williams v. State, 526 N.E.2d 1179 (Ind.1988); > Eveler v. State, 524 N.E.2d 9 (Ind.1988); > Carter v. State, 521 N.E.2d 669 (Ind.1988); > Coleman v. State, 520 N.E.2d 1270 (Ind.1988); > Rentas v. State, 519 N.E.2d 162 (Ind.Ct.App.1988); > Matthews v. State, 518 N.E.2d 807 (Ind.1988); > Jackson v. State, 518 N.E.2d 787 (Ind.1988); > Dowery v. State, 516 N.E.2d 67 (Ind.1987); > Whiting v. State, 516 N.E.2d 1067 (Ind.1987); > Johnson v. State, 515 N.E.2d 536 (Ind.1987); > Daniels v. State, 515 N.E.2d 530 (Ind.1987); > Tarver v. State, 513 N.E.2d 176 (Ind.1987); > Holmes v. State, 511 N.E.2d 1060 (Ind.1987); > Williams v. State, 511 N.E.2d 450 (Ind.1987); > Ford v. State, 506 N.E.2d 835 (Ind.Ct.App.1987); > Blacknell v. State, 502 N.E.2d 899 (Ind.1987); > Smith v. State, 502 N.E.2d 485 (Ind.1987); > Martin v. State, 499 N.E.2d 273 (Ind.Ct.App.1986); > Bynum v. State, 498 N.E.2d 108 (Ind.Ct.App.1986); > Parks v. State, 455 N.E.2d 904 (Ind.1983); > Mahone v. State, 429 N.E.2d 261 (Ind.Ct.App.1981); > United States v. Bhagavan, 116 F.3d 189 (7th Cir.1997); > United States v. Morgano, 39 F.3d 1358 (7th Cir.1994); > United States v. Buggs, 904 F.2d 1070 (7th Cir.1990); > Edwards v. United States, 814 F.2d 486 (7th Cir.1987); > United States v. Brooks, 748 F.2d 1199 (7th Cir.1984); > United States v. Wisniewski, 741

F.2d 138 (7th Cir.1984); > United States v. Bhagavan, 911 F.Supp. 356 (N.D.Ind.1995), > 911 F.Supp. 351 (N.D.Ind.1995); > United States v. Bryant, 895 F.Supp. 218 (N.D.Ind.1995); > United States v. Alba, 841 F.Supp. 868 (N.D.Ind.1994); > Edwards v. United States, 646 F.Supp. 42 (N.D.Ind.1986); > United States v. Cova, 580 F.Supp. 588 (N.D.Ind.1984)

*851 On March 6, 1990, attorney King filed a motion to add Michael Barnes, the prosecutor of St. Joseph County, as a witness, due to a letter Barnes had written to Matheney's parents in January, 1989, referring to Matheney as a "very sick man." King sought to have Barnes testify as a lay witness to Matheney's insanity. The prosecutor opposed that motion on March 9, 1990, on the basis that Barnes was not making the statement in a medical sense and that Matheney was attempting to manipulate the process by making Barnes a witness. Judge Letsinger denied the motion in a hearing on March 9, 1990, and denied the motion when it was offered again at trial.

Judge Letsinger conducted the trial of the case in South Bend, Indiana with a sequestered jury from citizens located in Lake County, Indiana. The
review here is under > 28 U.S.C. S 2254(d)(1), and the facts found by the highest court in the State of Indiana are entitled to a presumption of correctness under > 28 U.S.C. S 2254(e)(1). The focus is on violations of the statutes, treaties and Constitution of the United States, > Bell v. Duckworth, 861 F.2d 169 (7th Cir.1988), cert. denied, > 489 U.S. 1088, 109 S.Ct. 1552, 103 L.Ed.2d 855 (1989). The focus is not on violations of state law, > Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). In this case, as is required by both state law and the Constitution of the United States, the issues as between guilt and penalty were bifurcated but submitted to the same jury. > Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

During the guilt phase, the defense consisted of two kinds of testimony: first, the testimony of a prisoner at Pendleton in an effort to place part of the blame for Bianco's death on the officials at Pendleton who gave Matheney the pass; and second, the testimony of former attorneys of Matheney, his sisters, Dr. Charles Arens and Dr. Helen Morrison, in an effort to show that Matheney was legally insane at the time of the offense. Attorney Michael Scopelitis testified for over 200 pages of transcript about his attorney-client relationship with Matheney between 1980 and 1987. Scopelitis represented Matheney in his divorce from Bianco and on the criminal confinement charge. He testified that during the fall of 1986 and into 1987, Matheney exhibited bizarre behavior on a number of occasions, such that Scopelitis moved the court to have his competency tested. Attorney Joseph Rubin was appointed to represent Matheney on the battery charge, and he also testified as to Matheney's worsening mental condition while in jail awaiting sentencing on the battery charge.

*852 Matheney's sisters, Vicky Matheney-Brown and Marie Jenks, testified during the defense case as to the poor relationship between Matheney and Bianco and to the voluminous documents which he sent to his family while at Pendleton for them to copy and sign, all of which related to the alleged conspiracy between Bianco and Barnes. Attorney Tony Iemma had represented Matheney in a products liability suit against a gun manufacturer. Matheney had been shot in the leg when the gun went off accidentally. Iemma testified that he had a proposed settlement of $115,000 worked out with the manufacturer in the spring of 1985, when Matheney sent a letter directly to the counsel for the manufacturer suggesting that the suit was all lies and the gun had not malfunctioned. Iemma was eventually able to reinstate the settlement for $108,000, but he testified that Matheney had attempted to scuttle the settlement in an effort to deprive Bianco of a portion of the proceeds due to their impending divorce in the summer of 1985.

Dr. Charles Arens testified that he had met with Matheney on approximately a dozen occasions during 1985 and 1986 after he had been charged with the confinement of his children, initially while Matheney was in jail on that charge, then on several occasions after he was released on bond. Arens testified that he gave Matheney the Minnesota Multi-Facet Personality Inventory ("MMPI") while he was incarcerated at the St. Joseph County Jail in September, 1985, and on the basis of the results, Arens diagnosed Matheney with schizophreniform disorder. When Arens tested him again in April, 1986, though, Matheney tested as normal. Around that time, Matheney discontinued treatment because Bianco would not attend therapy with him. Arens saw Matheney once more, in January 1987, when Matheney visited him, accompanied by Bianco, who had clearly been abused, and Matheney admitted to abusing her. Arens recommended that Matheney take Bianco to the hospital and did not see them again.

Finally, the defense put on Dr. Helen Morrison. Dr. Morrison testified at length to Matheney's view of his relationship with Bianco. Morrison testified that Bianco had been taping her telephone conversations with Matheney, and that Matheney believed that the tapes contained evidence that he had not threatened or battered her. He became convinced that the tapes would exonerate him, and when he was unable to obtain the tapes through legal methods, he devised the plan to visit Bianco on a pass to get the tapes. Matheney told Morrison that he had visited Bianco in an effort to retrieve the tapes, and when she told him that she had called the police and he would be put away, he chased her out of the house and beat her. Morrison testified that she had listened to the tapes in question and had reviewed the reports of all previous psychological examinations and had reviewed Matheney's writings regarding Bianco. On the basis of her six hours spent interviewing Matheney and all of the other information reviewed, Morrison testified that Matheney was suffering from the mental disease of paranoid personality disorder.

She was not asked, and did not offer an opinion, about the ultimate question of whether Matheney could distinguish right from wrong at the time of the offense. Morrison refused, when pressed by the prosecutor, to even offer an opinion as to whether Matheney met the legal definition of mental disease.

After the defense rested, the court called its appointed experts, Drs. Batacan and Berkson. On questioning by the court, Dr. Batacan testified that Matheney did not have a mental disease as defined by the statute, but under further questioning by defense counsel, opined that hallucinations were a symptom of every mental disease, and thus Matheney did not have a disease because he did not have hallucinations. Dr. Berkson testified that hallucinations were not required, but he concurred that Matheney was not suffering from a mental disease at the time of the offense. Dr. Berkson also testified that he did not find Matheney to be delusional, but under cross-examination by defense counsel, he agreed that if Matheney were delusional, *853 he might have been suffering a mental disease.

In closing argument, as in his opening statement, defense counsel King admitted that Matheney had committed the murder, but he argued that Matheney was insane at the time of the offense. However, he was unable to rebut the statement by the prosecutor in closing that Morrison had not opined that Matheney was unable to determine right from wrong at the time of the offense. At 8:20 p.m., April 11, 1990, the jury returned a verdict of guilty on both the murder and burglary counts. The following day, the same jury heard three witnesses testify as character witnesses on Matheney's behalf in the penalty phase of the trial. No further medical testimony was given during the penalty phase, but defense counsel did argue that the mental illness mitigator would be applicable during the closing arguments of the penalty phase. The jury returned at 8:30 p.m. on April 12, 1990 and unanimously recommended the imposition of the death penalty. On May 11, 1990, Judge Letsinger followed the

recommendation the jury and entered a written order imposing the death sentence at that time.

After the entry of the death sentence, Matheney made a number of pro se filings with the Lake County Superior Court, including a letter requesting Judge Letsinger to order the Department of Corrections to allow him to speak with other attorneys and the media, a letter and motion seeking funds to hire "adequate assistance of legal counsel," and a motion to compel attorney Scott King to turn over Matheney's personal documents. Judge Letsinger denied the motions on the ground that the case was now before the Supreme Court of Indiana on direct appeal.

Scott King continued to represent Matheney on his direct appeal to the Indiana Supreme Court. In that appeal, King raised five issues on Matheney's behalf: did the trial court err in failing to instruct on the lesser-included offense; did the trial court err in denying the motion to call Barnes or admit the Barnes letter; did Count III (the intentional felony murder count) properly allege an aggravating circumstance; was the evidence sufficient to support Count IV (the lying in wait charge) as an aggravating circumstance; and was imposition of the death penalty appropriate. The Indiana Supreme Court affirmed the trial court on both conviction and sentence. > Matheney v. State, 583 N.E.2d 1202 (Ind.1992). The Supreme Court found that there was no evidence of sudden heat to support the giving of the voluntary manslaughter instruction, and that a plea of insanity was not "compatible with the inference of guilt of a lesser-included offense." > 583 N.E.2d at 1206. They further ruled that the Barnes testimony was appropriately excluded because there were no "extraordinary circumstances" or "compelling reasons" to violate the rule that prosecutors cannot be called as defense witnesses. > Id. The Court held that the intentional felony murder aggravator was not inappropriate because the legislature could have reasonably determined that "a murder committed by breaking and entering a dwelling in the place where a person should be able to

feel secure" merited the death penalty. > Id. at 1208. They found that the evidence supported the lying in wait aggravator when considering the amount of time it took from Matheney's departure from Rob Snider's home to the first 911 call, Matheney's parking away from the home, and his approaching the home through the alley. > Id. at 1209. Finally, the Indiana Supreme Court held that the death penalty was appropriate, given the lack of mitigators, including the inability to conform to the requirements of the law mitigator, and the presence of two aggravators. > Id. Justice DeBruler concurred as to the conviction but dissented from the penalty, finding that the evidence did not support the lying in wait aggravator and finding that several mitigators were present, including turning himself in to police and acting "under the influence of extreme mental and emotional disturbance." Matheney filed a petition for writ of certiorari to the United States *854 Supreme Court, but certiorari was denied. > Matheney v. Indiana, 504 U.S. 962, 112 S.Ct. 2320, 119 L.Ed.2d 238 (1992).

After the writ of certiorari was denied, the Indiana Public Defender entered her appearance on behalf of Matheney, and on November 25, 1992, a petition for post-conviction relief was filed in the Lake County Superior Court. The case was originally assigned to Judge Letsinger, but Matheney by counsel filed a motion for new judge, and on January 29, 1993, Judge Conroy, another judge of that court, assumed jurisdiction over the case. On March 9, 1994, Chief Justice Shepard of the Indiana Supreme Court instructed Judge Conroy to bring the post conviction petition to trial for decision on the merits by the end of 1994. During the summer of 1994, Matheney filed several pro se filings, asserting that the Indiana Public Defenders office was failing to provide him with adequate representation because they were not pursuing his recommended line of defense. Such filings were received in the record, but were refused for filing as Matheney was represented by counsel.

On September 9, 1994, counsel for Matheney amended the petition and included the allegation that Matheney had been

incompetent to stand trial. This issue was raised both as an ineffective assistance of counsel claim and as a due process claim. On the same day, Matheney's counsel filed a notice of incompetence and petition to stay the proceedings. Matheney pro se filed several motions aimed at the notice of incompetence, including a response asking that he be allowed to prove his own competence, and letters to the disciplinary commission charging his public defenders with violating the attorney-client privilege by filing the notice of incompetency. At the hearing on October 11, 1994 before Magistrate T. Edward Page > [FN3], Matheney was found competent and the parties presented evidence on the petition. Matheney presented the depositions of his cousin Patty Gennicks, his attorneys, Charles Lahey, Scott King, and Phil Skodinski, Dr. Helen Morrison, and Dr. Myron Berkson, and affidavits from his mother, his sisters,
and his brother Howard, all of which related incidents from Matheney's childhood, Steven Radde, who did the investigation work for the defense prior to trial, Lois Thompson, who testified at trial as Lois Nemeth, and attorney Ken Hays, who had represented him in a small claims matter and who sent a letter to the St. Joseph County Probation Department in August, 1987 regarding his belief that Matheney's personality was deteriorating in prison. In his deposition, Lahey testified that Matheney had been obsessed with his belief that Bianco was having an affair with Barnes. He further testified, though, as follows:

> FN3. Counsel for Matheney also filed a motion to recuse Magistrate Page for the following reason. On the day Magistrate Page received the notice of incompetence, he read in the affidavit of Dr. Smalldon that Dr. Smalldon was advised by counsel not to disclose the reasons for his finding. Magistrate Page was then in the presence of a member of the Lake County Prosecutor's Office and a member of the Indiana Public Defender's Office, and he stated in their presence "I can't believe these people. They want me to find Matheney incompetent but they won't tell me why." Counsel

for Matheney moved to have Magistrate Judge Page recuse himself on the basis that he had prejudged the case on the basis of this remark, but he refused to do so. Any claim here concerning Magistrate Page or
Matheney's incompetence at post-conviction relief was specifically abandoned at the oral argument on July 9, 1998.

Despite his obsessive conduct, I didn't find Alan that incapable of planning his own defense. In fact, he was actively planning it although it wasn't right in all regards. His defense which he wished me to make for him was--pardon my characterization of this because I believe it may very well be his own words was that--the bitch deserved it, that was really the heart of the defense that he wished me to make for him.

When questioned whether Matheney was competent to assist in his defense, Lahey answered:

*855 Alan was about as much assistance as a mosquito bite. I mean he really was no assistance to us. I didn't necessarily attribute that to his lack of competence, though. You know, as we discussed here, his obsession with a defense which was not recognized by law let alone by a jury for Pete's sake or even the laws of morality, his obsession with that and his refusal or inability to give us--to work with us on any evidence other than along those lines that--here's a case I want you to present and here's the evidence you are going to go out and get to have me do it. When I know that I can't make that defense, it made it a chore at times to talk to him and made him of no real effective assistance to us whatsoever on what real legitimate issues existed in
the case. So to that extent he was useless to us and was absolutely of not assistance. I didn't label that on the grounds of competence.

When asked if he felt Matheney was competent to stand trial, Phil Skodinski stated that:

I think he was. I mean, some of his ideas were good ideas, but that doesn't necessarily mean he wasn't competent to use his own defense. He wanted to interview people and use

them as witnesses which some weren't very good people to use as witnesses. But I am not sure that's the criteria to provide you are not competent to assist in your own defense. It depends on what you feel is competent. He certainly understood what he was charged with or what evidence to find he was not guilty. In that regard I guess he was competent to assist in his own defense.

Scott King testified in his deposition that Matheney did not cooperate with counsel to the full extent of his ability "partially because he couldn't because of his mental status" and "partially because he didn't want to." He further testified that Matheney believed "she was absolutely kingpin in this conspiracy against him. No insight whatsoever into him having any culpability for any of the problems that they had had. Which, again, reinforced my view that--I mean, that he mentally and emotionally was not fully equipped." King stated that he had a good faith belief that Matheney was mentally ill, but he also stated that Matheney made a decision "as rational as Alan would be" to go forward with the insanity defense.

Dr. Helen Morrison testified in her deposition that she felt she had been inadequately prepared by counsel. She further stated that she did not believe Matheney was insane at the time of the offense, as he knew the difference between right and wrong, but that his delusion was so overwhelming that he was unable to avoid doing what he knew was wrong. She also stated that the delusion was so strong that Matheney was not able to rationally understand the trial and that she did not believe that his condition would have improved since 1990. Dr. Berkson stated in his 1994 deposition that his finding that Matheney was sane was not inconsistent with Dr. Morrison's conclusion that Matheney was suffering from paranoid personality disorder, and Dr. Berkson further opined that he felt Matheney was suffering from paranoid personality disorder also, but that the disorder did not make him legally insane at the time of the offense.

The state presented an affidavit from the trial bailiff concerning the separation of jurors and alternates, an

affidavit from the prosecutor who tried the case concerning his opinion of the efficacy of Scott King as counsel, and the deposition of Dr. Myron Berkson taken in May, 1989, after his interview of Matheney. As stated above, Dr. Berkson in 1989 opined that Matheney was legally sane and not under a delusion, but he did not give any opinion as to competency.

At the end of the hearing, Magistrate Page asked counsel for briefs, but not findings of fact. In an off the record discussion, Magistrate Page explained that he wanted an outline of the arguments. The Indiana Public Defender thus presented a brief on November 22, 1994, with an outline of the claims, but little legal citation *856 or reference to facts in the record. The State responded on December 19, 1994 with a brief that did make some legal argument, but in a summary fashion. On April 7, 1995, the Indiana Public Defender moved the court to delay ruling so that it might supplement its brief to include record citations and legal argument. The court denied that motion and entered its findings of fact and conclusions of law on April 10, 1995. Many, if not most, of Matheney's claims were treated as waived because he failed to "state specific facts from which this court can determine the substance of the alleged error." The claims that the court did address it found to have no merit. Thus, the petition for post-conviction relief was denied.

Matheney appealed the denial to the Indiana Supreme Court. In an opinion dated November 24, 1997, the Indiana Supreme Court affirmed the decision of the post-conviction court in denying Matheney relief. > Matheney v. State, 688 N.E.2d 883 (1997). On the appeal of his post-conviction relief, Matheney raised four due process issues and several instances of ineffective assistance of counsel. Matheney first asserted that he had been incompetent to proceed with his post-conviction petition due to his paranoid personality. The court
held that the trial court held correctly found Matheney to be competent and able to assist his counsel. > 688 N.E.2d at

893. Matheney then challenged the post conviction court's denial of his motion to disclose the names of the trial jurors for purposes of interviewing them. The court found that there was no evidence that the trial jurors had been tampered with, and thus affirmed the PCR court's denial. > Id. at 894. Matheney then challenged Judge Conroy's use of Magistrate Page, both by challenging the Magistrate Act and by challenging Page personally as having been biased. The court found the magistrate act to be constitutional and Magistrate Page to have been free of bias. > Id. at 894-96. Matheney made several allegations of ineffective assistance of trial and appellate counsel in his appeal of his post-conviction relief petition. The Indiana Supreme Court found the allegations unpersuasive as a whole, and only addressed a few major claims in this area. Matheney first argued that trial counsel erred in utilizing the insanity defense during the guilt phase and further erred in not pursuing the mental health mitigator during the penalty phase. The court found that there was no logical alternative strategy for counsel to employ at trial, and found that Matheney was not prejudiced by counsel's failure to elicit further testimony from Dr. Morrison during the penalty phase. > Id. at 898-99. Matheney also asserted that his counsel was deficient in failing to raise Matheney's competence to stand trial. The court held that on the basis of the reports by Drs. Batacan and Berkson and trial counsel's own opinions of Matheney's competency, counsel were not ineffective for failing to request a hearing to determine Matheney's competency. > Id. at 899. Matheney also complained that his trial counsel had failed to preserve fundamental errors, including prosecutorial misconduct, jury instruction errors, and the constitutionality of the Indiana death penalty statute. The court found the prosecutorial misconduct claim to have been waived, the jury instructions to have been correct statements of the law, and that the Indiana death penalty statute, and the aggravating and mitigating factors found therein, was constitutional. > Id. at 900-08.

Finally, after the parties had filed their initial briefs before the Indiana Supreme Court, Matheney's counsel discovered that Judge Letsinger had asked the probation department to administer a pre-sentence questionnaire based on the Minnesota Multiphasic Personality Inventory ("MMPI") on Matheney, and that the questionnaire was not then presented to defense counsel prior to sentencing. Matheney challenged the questionnaire on the ground that he was unable to contest the information, which may have impacted Judge Letsinger's sentencing decision. The Indiana Supreme Court, rather than remand the case to the post-conviction *857 court to consider the questionnaire, independently reviewed the aggravating and mitigating circumstances and determined that the sentence was appropriate, and thus the questionnaire issue
was moot. > Id. at 909-10. Thus, the Indiana Supreme Court affirmed the post-conviction court in denying relief. Matheney filed a writ of certiorari to the United States Supreme Court pertaining to the 1997 decision of the Indiana Supreme Court, but certiorari was denied on February 22 of this year. See > Matheney v. Indiana, 525 U.S. 1148, 119 S.Ct. 1046, 143 L.Ed.2d 53 (1999).

Having exhausted his state court remedies, Matheney filed his petition for writ of habeas corpus with this court on July 11, 1998.> [FN4] In that petition, Matheney raised the following claims for review by this court: 1) that Matheney's conviction and sentence violate due process because he was not competent to stand trial; 2) that Matheney's conviction and sentence violate due process because the trial court failed to sua sponte hold a competency hearing; 3) that trial counsel ineffectively assisted Matheney because they failed to raise his competency to stand trial; 4) that the trial court's refusal to allow Prosecutor Barnes to be called as a witness violated Matheney's Sixth and Fourteenth Amendment rights to present favorable evidence; 5) that the trial court's refusal to instruct the jury on the lesser included offense of voluntary manslaughter violated Matheney's rights under the Eighth and Fourteenth Amendments; 6) that the trial judge's

compilation of a psychological profile of Matheney without counsel's knowledge violated Matheney's Eighth and Fourteenth Amendment rights; 7) that trial counsel ineffectively assisted Matheney during the penalty and sentence phases of his trial by failing to offer evidence which proved mitigating factors; 8) that Matheney's rights under the Eighth and Fourteenth Amendments were violated because insufficient evidence supported the lying-in-wait aggravator; 9) that the lying-in-wait aggravator is vague and overbroad, in violation of the Eighth and Fourteenth Amendments; and 10) that the "felony murder" aggravator is vague and overbroad in violation of the Eighth and Fourteenth Amendments. The Attorney General of Indiana filed his return to the order to show cause on March 29, 1999, and this court heard oral argument on the petition on July 9, 1999 in South Bend, Indiana.

> FN4. Matheney amended his petition to add two additional claims on August 17, 1998, but he withdrew those claims, as well as Claims IV and VI from his initial petition, on June 8, 1999. The court will not address the withdrawn claims.

This court must note that it has some familiarity with this petitioner, having been the presiding judge over a claim filed pro se by this petitioner asserting a violation of > 42 U.S.C. S 1983 by Prosecutor Michael Barnes, assistant St. Joseph County prosecutor John Krisor, Dr. Hansel Foley, the St. Joseph County Police, and James Aiken of the Indiana Department of Correction,
which complaint this petitioner filed on September 11, 1989 while he was incarcerated awaiting trial. That suit alleged that Matheney's constitutional right to medical treatment had been denied by Dr. Foley, the St. Joseph County Police and the Indiana Department of Corrections, that his right to a fair trial had been denied by Barnes and Krisor because of pre-trial publicity, that he had been placed in solitary confinement with no opportunity to exercise in violation of the Eighth Amendment, and that he had been denied access

to the law library at the St. Joseph County Jail in violation of the Sixth Amendment. This court granted dismissed the claims against Barnes, Krisor, the St. Joseph County Police, and James Aiken on December 7, 1989, but allowed Matheney to continue his claims against Dr. Foley. On October 6, 1993, this court granted summary judgment in favor of Dr. Foley. Matheney appealed the decisions of this court pro se to the United States Court of Appeals for the Seventh Circuit, which affirmed this court in an unreported decision. > Matheney v. Foley, 83 F.3d 424 (7th Cir.1996) (table). Additionally, Matheney filed a pro se petition *858 for writ of habeas corpus attacking his 1987 convictions in this court on March 8, 1991, which this court denied on May 9, 1991, as Matheney was no longer incarcerated on his 1987 convictions at that time. The Seventh Circuit summarily affirmed this court's decision on August 21, 1991. In both of those causes, Matheney represented himself in a cogent manner.

II. Standard of Review

As a preliminary matter it does not appear that this petitioner is entitled to a further evidentiary hearing in this Court under > 28 U.S.C. S 2254(e)(2) and > Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992). The factual record presented here is to say the least massive. The request for additional discovery is not well taken under > Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997).

> [1] A claim under > 28 U.S.C. S 2254 requires the federal habeas court to ensure that the state criminal conviction was not achieved at the expense of the petitioner's constitutional rights. Justice Stewart, speaking for the Supreme Court of the United States in > Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), described the role of the federal district courts in habeas proceedings:

A judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, as is any judgment affirming a criminal

conviction. But Congress in S> 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law. The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state postconviction remedies to redress possible error. What it does not presume is that these state proceedings will always be without error in the constitutional sense. The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur--reflecting as it does the belief that the "finality" of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right--is not one that can be so lightly abjured.
> Id. at 323, 99 S.Ct. at 2791 (citation omitted).
The Congress of the United States has codified the holdings of > Jackson and its progeny through the AEDPA, which amended > 28 U.S.C. S 2254, in relevant part, as follows:
In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
> 28 U.S.C. S 2254(e)(1).
When Congress passed the AEDPA, the standards of review that the court must apply to the merits of a petition for writ of habeas corpus under S> 2254 also changed significantly. > Section 2254 was further amended in pertinent part:
An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to
any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim--
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

> 28 U.S.C. S 2254(d). As such, the AEDPA provides a "new, highly deferential standard *859 for evaluating state court rulings." > Lindh v. Murphy, 521 U.S. 320, 333 n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

It remains basic to this day that claims of constitutional violations must first be fairly presented to the state court, as defined by Justice Scalia in > Castille v. Peoples, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989), and reaffirmed most recently in > O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). In > Moore v. Parke, 148 F.3d 705 (7th Cir.1998), the Seventh Circuit explained that:

A prerequisite for applying this section is that the state court adjudicated the issue before us on the merits.... [Because] the state courts did not address Moore's sufficiency of the evidence argument on the merits, ... the new standard of review in AEDPA does not apply.

> 148 F.3d at 708. However, the court went on to explain that the
petitioner must first have "provided the state courts with a full and fair opportunity to review his claims." > Id., citing > Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). The Seventh Circuit has provided the following framework to determine whether a state court has been provided a fair opportunity to consider a petitioner's federal constitutional claims:

If the petitioner's argument to the state court did not: (1) rely on pertinent federal cases employing constitutional analysis; (2) rely on state cases applying constitutional analysis to a similar factual situation; (3) assert the claim in terms so particular as to call to mind a specific constitutional right; or (4) allege a pattern of facts that is well within the mainstream of constitutional litigation, then this court will not consider the state courts to have had a fair opportunity to consider the claim. However, the presence of one of these factors, particularly factors (1) or (2), does not automatically

avoid a waiver; the court must consider the specific facts of each case.

> Verdin v. O'Leary, 972 F.2d 1467, 1473-74 (7th Cir.1992). Petitioner, here represented by able and experienced death penalty counsel, has the burden to establish a basis for federal collateral relief.

III. Competency Claims

> [2]> [3] Petitioner's first three claims all center around his contention

that he was incompetent to stand trial. The first claim is that his incompetency at trial violated his due process rights. The second asserts that the trial judge should have sua sponte held a competency hearing, and his failure to do so abridged Matheney's due process. Finally, Matheney asserts that his counsel ineffectively assisted him because they failed to question his competency to stand trial. As an initial matter, the state asserts that Matheney has procedurally defaulted the first two claims because he failed to raise them during his post-conviction relief proceedings. On page 81 of his appeal brief to the Indiana Supreme Court, the following heading appears:

Matheney's Convictions and Sentence Violate Due Process Because He Was Not Competent To Stand Trial. Trial Counsel Ineffectively Represented Matheney By Failing to Alert The Court That Matheney Was Unable to Rationally Understand The Proceedings and Unable to Assist in His Defense, and the Trial Court Neglected Its Affirmative Obligation to Inquire.

In one paragraph of the six pages that follow that heading, Matheney asserts that

the trial of an incompetent person can never satisfy the demands of the due process clause of the United States Constitution. > Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). The prohibition on trying an incompetent person is "fundamental to an adversary system of justice." > Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

The right to be competent to stand trial cannot be *860 waived. > Pate v. Robinson, 383 U.S. at 384, 86 S.Ct. 836. Petitioner's Brief to Indiana Supreme Court on PCR, p. 83 (parallel citations omitted.) The following paragraph asserts the trial court's affirmative duty to resolve the question of competency. The remainder of the six pages address the facts showing Matheney's incompetency and his counsel's failure to address it. Certainly the Supreme Court of Indiana did not address the due process and sua sponte claims separately in its twenty page opinion in > Matheney v. State, 688 N.E.2d 883 (Ind.1997). However, under > Porter v. Gramley, 112 F.3d 1308 (7th Cir.1997), "a habeas petitioner must only 'fairly alert' the state court of the federal constitutional grounds for his claim, and we have stated that 'what is important is that the substance of the federal claim be presented fairly.' " > 112 F.3d at 1315. (citations omitted) (emphasis in original). As discussed in the standard of review section supra, under > Verdin v. O'Leary, if the petitioner relies on pertinent federal cases employing constitutional analysis, the court should consider the specific facts of the case to determine if a waiver has been made. > Verdin, 972 F.2d at 1472-73. Although the due process and sua sponte claims were each the subject of one paragraph in a 125 page brief, it appears that the issue was adequately raised to present the issue. Thus, it appears that Matheney properly raised the claims before the state court. Given the manner in which the Supreme
Court of Indiana dealt with the issue of competency to stand trial in 1990, it is the obligation of this court to examine the entirety of the record before it de novo. It must be emphasized, however, that it is the entirety of the record that is examined and not just fragments of it. Additionally, under > Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815, the right to be competent to stand trial cannot be waived, and thus can be raised at any point in the process. See > Gosier v. Welborn, 175 F.3d 504 (7th Cir.1999).

As to the third claim, that of ineffective assistance of counsel for failing to raise the issue of Matheney's competence to

stand trial, that claim is judged under the standards of > Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on this claim, Matheney must establish two elements: first, that counsel's performance fell below an objective standard of reasonably effective representation; and second, that the "deficient performance prejudiced the defense." > Id. at 687-88, 104 S.Ct. 2052. For the first prong, the petitioner must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." > Id. at 690, 104 S.Ct. 2052. On the second prong, the petitioner must show a "reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different." > Id. at 694, 104 S.Ct. 2052.

> [4]> [5] In > Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), the United States Supreme Court held that the standard for competence to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." > Id. The Supreme Court applied the > Dusky standard to a federal habeas review of state court proceedings in > Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). See also > Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) (applying > Dusky standard to decision to waive counsel and/or plead guilty). Thus, at the time of petitioner's trial, it was clear that the Due Process Clause required that a criminal defendant be competent to stand trial. Additionally, under > Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), a trial court must conduct a competency hearing when the information *861 known to the trial court at the time of the trial is sufficient to raise a bona fide doubt regarding the defendant's competency.

> Robinson, 383 U.S. at 385, 86 S.Ct. 836. The relevant factors to be considered in assessing the issue of competency are a defendant's "irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." > Drope, 420 U.S. at 180, 95 S.Ct. 896. There must be some manifestation, some conduct, on the defendant's part to trigger a reasonable doubt of his competency. See > id.; > United States v. Collins, 949 F.2d 921, 924 (7th Cir.1991). As part of making this objective inquiry, a court may also consider the attorney's representations concerning the defendant's competency. > Drope, 420 U.S. at 177 n. 13, 95 S.Ct. 896 (noting that with respect to determining competency, "it is nevertheless true that judges must depend to some extent on counsel to bring issues into focus").

> [6] Focusing on the facts of this case, the place to start is the order of Judge Swartz on March 27, 1989, granting Matheney's motion for examination to determine his "competency to stand trial and sanity." As stated above, neither Dr. Batacan nor Dr. Berkson actually opined as to Matheney's competency, but both stated that Matheney was sane at the time of the offense, with no mental disease or defect. Additionally, as the Indiana Supreme Court noted in its decision, Dr. Berkson "stated that during his examination Matheney had no difficulty responding promptly to his questions, organizing his thoughts, or putting his thoughts together in a logical, sequential order." > 688 N.E.2d 883. Dr. Berkson testified during his deposition in May, 1989 that he had previously found Matheney competent in 1987, although, as noted above, he was not asked about Matheney's competence in 1989.

None of Matheney's trial counsel believed him to be incompetent. Charles Lahey testified that

> Despite his obsessive conduct, I didn't find Alan that incapable of planning his own defense. In fact, he was actively planning it although it wasn't right in all regards. His defense which he wished me to make for him was--pardon my characterization of this because I believe it may

very well be his own words was that--the bitch deserved it, that was really the heart of the defense that he wished me to make for him.

When questioned whether Matheney was competent to assist in his defense, Lahey answered:

Alan was about as much assistance as a mosquito bite. I mean he really was no assistance to us. I didn't necessarily attribute that to his lack of competence, though. You know, as we discussed here, his obsession with a defense which was not recognized by law let alone by a jury for Pete's sake or even the laws of morality, his obsession with that and his refusal or inability to give us--to work with us on any evidence other than along those lines that-- here's a case I want you to present and here's the evidence you are going to go out and get to have me do it. When I know that I can't make that defense, it made it a chore at times to talk to him and made him of no real effective assistance to us whatsoever on what real legitimate issues existed in the case. So to that extent he was useless to us and was absolutely of not assistance. I didn't label that on the grounds of competence.

Attorney Phil Skodinski testified that he felt Matheney competent, stating:

I mean, some of his ideas were good ideas, but that doesn't necessarily mean he wasn't competent to use his own defense. He wanted to interview people and use them as witnesses which some weren't very good people to use as witnesses. But I am not sure that's the criteria to provide you are not competent to assist in your own defense. It depends on what you feel is competent. He certainly understood what he was charged with or what evidence to find he was not guilty. In that regard I guess *862 he was competent to assist in his own defense.

Attorney Scott King did not specifically testify as to Matheney's competency. He stated that he believed Matheney to be mentally ill, but he also stated that Matheney rationally concurred in the decision to use the insanity defense.

Matheney cites the evidence of Dr. Helen Morrison to show his lack of competency to stand trial. Dr. Morrison testified that Matheney suffers from paranoid personality disorder with delusional aspects. Matheney believed, and believes, that Bianco and Barnes were engaged in an affair, and that they conspired to use the power of Barnes' office to keep him incarcerated. Morrison testified that Matheney's period of incarceration prior to the offense here caused his delusion to grow so severe that he became grossly psychotic. Based on her finding of that delusion, Morrison testified that Matheney "had no concept in my opinion of what was going on as far as his role in the trial was concerned." She did not believe that Matheney could realistically look at the facts of his situation or rationally consult with counsel.

Matheney also points to his behavior in court during various pre-trial conferences. At the end of the hearing on December 4, 1989, after the court addressed the efforts to obtain a videotape of WNDU's newscast on Dyngus Day, on which Matheney asserted there was evidence of Bianco's relationship with Barnes, Matheney asked if he could speak, then informed the court that he was speaking to several different attorneys about the case and he felt that his family members' phones, which he was utilizing to make three-way calls to various attorneys, were being tapped. Additionally he asserted that evidence had been stolen from someone and that the police had been involved. Judge Whitman, then presiding over the case, told Matheney that he would only address evidence of such incidents as was properly submitted to him. Thereafter, Matheney filed a pro se motion for change of venue. On December 21, 1989, the court held a hearing at which Matheney stated to the court that he was asking for the change of venue due to Bianco's relationship with Barnes, which he felt tainted his ability to obtain testimony from other attorneys in St. Joseph County. The court conducted a colloquy with Matheney personally concerning his constitutional right to be tried in St. Joseph County. After that discussion, Judge Whitman queried attorneys Lahey and Skodinski on the motion, which they

opposed. Lahey stated that the court-appointed psychiatrists had "found him to be competent, so, we would indicate to the Court that we don't
think that this is a matter of incompetency on Mr. Matheney's part in making the request. We just think that he is incorrect."

In considering this issue on Matheney's petition for post-conviction relief, Magistrate Page wrote that Matheney was:

"[I]ntensely and narrowly focused on the belief that his ex-wife and the prosecuting attorney in St. Joseph county were having an affair. He believes he was imprisoned prior to the murder as part of a conspiracy between putative lovers to keep him out of the way. And finally he believes his capital prosecution for murder was an extension of that conspiracy because the prosecuting attorney wanted to forever silence the petitioner about the affair. The petitioner is so narrowly focused on this alleged conspiracy that he sees the actions of others, including those of the trial court and his own attorneys, as extensions of the conspiracy to keep the affair from being litigated in the courts."

Having said that, though, Magistrate Page and Judge Conroy found that Matheney had been competent to stand trial under the Indiana standard that an individual is not competent when he is unable to understand the proceedings and assist in the preparation of his defense. > Ind.Code S 35-36-3-1(a).

On the basis of all of the facts stated above, this court finds that Matheney was competent to stand trial under the > Dusky standard. He understood the facts of the *863 situation and he understood the consequences of trial and sentencing. Additionally, he provided some assistance to his counsel, perhaps not as much as they would choose, but not completely unhelpful. Importantly, none of his counsel, including the very experienced lead counsel, felt that he was incompetent. This court does not doubt that these very able lawyers would have raised the incompetence issue had it been appropriate. Although this court is well aware of Mr. Matheney's beliefs as to the alleged relationship between his former wife and the prosecutor of St. Joseph County, this

court does not find that those beliefs so impeded Matheney's appreciation of his situation as to render him incompetent to stand trial. Thus, his due process right to be tried as a competent individual was not violated. Similarly, as Matheney was competent to stand trial, the trial judge's failure to sua sponte order a competency hearing was not a violation of his due process rights. As Matheney was competent, his attorneys' failure to raise the issue did not prejudice him and thus was not violative of his Sixth Amendment rights to effective assistance of counsel.

IV. Barnes as Witness Claim

> [7] Matheney next asserts that the trial court's refusal to permit defense counsel to call Michael Barnes as a defense witness denied Matheney's right to present favorable evidence in violation of the Sixth and Fourteenth Amendments to the Constitution. One of the time bombs that these counsel surely had to consider was the insistence by this petitioner that Michael
Barnes, the Prosecuting Attorney of St. Joseph County, be called as a witness for the defense. It is very hard to find in this record except from the unproven assertions of this petitioner that anything that this petitioner's counsel could have asked Prosecutor Barnes would have been in any way helpful to this petitioner, much less bring about his acquittal. It is correct that Prosecutor Barnes did testify at a pretrial hearing and admitted that he described this petitioner as "sick" in a letter because petitioner expressed no remorse for his previous arrest and conviction of battery and confinement. Barnes also testified that he believed this petitioner was sane. Other witnesses were present who could have testified on either of those subjects and in fact there was abundance of evidence on the insanity-mental health issue.

In > Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), the Supreme Court made clear that "it is not the province of a federal habeas court to reexamine state-court determination on state-law questions. In conducting habeas review, a federal court is limited to deciding whether

a conviction violated the Constitution, laws or treaties of the United States." > 502 U.S. at 67-68, 112 S.Ct. 475. In its decision on Matheney's direct appeal, the Indiana Supreme Court addressed this issue and decided it on the state law ground that counsel, and especially a prosecutor, should not be called as a witness. > Matheney v. State, 583 N.E.2d 1202, 1206-07 (Ind.1992). Under the AEDPA, this court can only grant relief on this issue
if it finds that the decision of the state court was an "unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." > 28 U.S.C. S 2254(d)(1). The question is thus whether the Supreme Court of Indiana's decision on the evidentiary question was an unreasonable application of clearly established federal law. In > Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the Supreme Court held that the right to call witnesses on one's behalf has "long been recognized as essential to due process." > Chambers, 410 U.S. at 294, 93 S.Ct. 1038. However, that court also noted that its holding did not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." > Id. at 302-03, 93 S.Ct. 1038. In its recent opinion in *864 > Gardner v. Barnett, 175 F.3d 580 (7th Cir.1999), the Seventh Circuit recognized that while "the right of a defendant to present witnesses is 'the right to present a defense,' ... the right is not absolute and must be balanced against other legitimate interests in the criminal trial process." > 175 F.3d at 584-85. In both > Chambers and > Gardner, a key issue for the courts was the fact that the witness not presented (or not presented fully in > Chambers) provided significant exculpatory evidence. In fact, the three excluded witnesses in > Chambers all would have testified to the admission of guilt by another person. There has never been any question that Matheney committed the murder of Lisa Bianco. The

testimony of Barnes was simply being offered as lay testimony on the question of Matheney's sanity. As stated above, other witnesses could and did testify on that issue, and it is unlikely that Barnes' testimony would have been of any help to Matheney. Under the facts and circumstances of this case, Matheney was not deprived of a fair trial, and thus no writ should issue on this ground.

V. Lesser Included Offense Instruction Claim

> [8] Matheney next asserts that the trial court's refusal to instruct the jury as to the lesser included offense of voluntary manslaughter violated his rights under the Eighth and Fourteenth Amendments. Under > Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the death penalty may not be imposed "after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict." > 447 U.S. at 627, 100 S.Ct. 2382. Matheney here argues that there was sufficient evidence to support the giving of a voluntary manslaughter instruction. > Fox v. State, 506 N.E.2d 1090 (Ind.1987) explains that "killing in the sudden heat of passion is the element that distinguishes voluntary manslaughter from murder, but there must be sufficient provocation to induce such passion to render the defendant incapable of cool reflection." > 506 N.E.2d at 1097. "Additionally, words alone cannot constitute sufficient provocation to give rise to a finding of sudden heat warranting an instruction on voluntary manslaughter." > Matheney v. State, 583 N.E.2d 1202, 1205 (Ind.1992) (citing > Perigo v. State, 541 N.E.2d 936 (Ind.1989)). The evidence at trial was that Matheney was angry and growling when he entered the home, and that he became further angered when Bianco told their daughter to call the police. The Indiana Supreme Court considered this issue on Matheney's direct appeal and, applying > Perigo and > Fox, determined that there was "no evidence from which the jury logically could find sudden heat." > Matheney, 583 N.E.2d at 1205.

That court also held as a matter of state law that the "trial court does not err when it refuses to instruct the jury as to a lesser-included offense in a prosecution for murder where the defense of insanity is used to disprove intent to commit the greater offense, and thus would not be compatible with the inference of guilt of a lesser-included offense." > Id. at 1206 (citing > Rowe v. State, 539 N.E.2d 474 (Ind.1989)). Matheney asserts that this element of the Indiana Supreme Court decision adds an impermissible additional requirement to the > Beck standard that a lesser-included offense instruction must be given when the evidence supports such an instruction. However, it is clear that the Indiana Supreme Court's decision is not bottomed solely on this theory, but also on the insufficiency of evidence from which to give a lesser- included offense instruction, and that is the heart of the > Beck analysis. Thus, the Indiana Supreme Court's decision is not an unreasonable application of > Beck, for purposes of the AEDPA, and no writ should issue on this claim.

VI. Presentence Questionnaire Claim

> [9] Matheney's next claim is that his rights under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment were violated by the fact that, *865 without notice to him or his counsel, the sentencing judge received and reviewed a psychological questionnaire pertaining to Matheney prior to sentencing him to death, and by the Indiana Supreme Court's belief that it could cure that error by reweighing the evidence. Much is said in the record with regard to the way that Judge Letsinger went about sentencing of this defendant. Whatever else may be said about the process, it must be said that he went about the task in great detail and with great care. Whether or not the particular questionnaire that he used is a wise procedure is not the question. The question is whether or not it violates the Eighth Amendment of the Constitution of the United States particularly as interpreted twenty-two years ago in > Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The factual setting here with reference to the

use of the questionnaire is different than that outlined in the plurality opinion in > Gardner by Justice Stevens. In > Gardner, the trial court relied upon a confidential portion of the presentence investigation report to reject the recommendation of the jury and impose the death penalty. > 430 U.S. at 352- 53, 97 S.Ct. 1197. Here, unlike > Gardner, the judge ultimately accepted the recommendation of the jury. It is undisputed that, under the procedure in Indiana, a state trial judge can impose the death penalty even when a jury fails to recommend it. > Schiro v. State, 451 N.E.2d 1047 (Ind.1983); habeas relief denied sub nom. > Schiro v. Clark, 754 F.Supp. 646 (N.D.Ind.1990), aff'd, > 963 F.2d 962 (7th Cir.1992), aff'd sub nom. > Schiro v. Farley, 510 U.S. 222, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994), post conviction relief granted in > Schiro v. State, 669 N.E.2d 1357 (Ind.1996). The other side of that coin appears to be that a state trial judge in Indiana can decline to impose the death penalty even when a jury recommends it, although that didn't happen in this case.

On review of the post-conviction relief court, the Supreme Court of Indiana examined this issue under the teachings of > Gardner. > Matheney v. State, 688 N.E.2d 883, 908-10 (Ind.1997). Although the court appeared to be sure that the trial court judge had not relied upon the undisclosed information in determining the sentence, and thus not in violation of > Gardner, they independently reviewed the aggravating and mitigating circumstances to determine if the death penalty was appropriately invoked. > Id. at 909. Although the Supreme Court of the United States remanded > Gardner to the trial court, rather than the Florida Supreme Court, for reconsideration of the sentence, that was based, in part, on the belief that the judge might be swayed by the attorney's arguments regarding the secret information to follow the jury's recommendation of life in prison. Here, where the jury, the judge, and the Indiana Supreme Court have all found that the aggravating circumstances all outweigh the mitigating circumstances, or lack thereof, this court finds

that, like the Indiana Supreme Court, little purpose would be served by a remand. This Court finds no Constitutional error in the totality of the sentencing procedures of Judge Letsinger as they are reflected in the record of this case. > [FN5]

> FN5. It must be noted that this questionnaire was never in any way given to the jury that recommended the death penalty.

VII. Effective Assistance in Penalty and Sentencing Claim

Matheney then asserts the claim that he was denied his right to effective assistance of counsel at the penalty and sentencing phases of his trial, rendering his death sentence unreliable in violation of the Sixth and Fourteenth Amendments to the Constitution. As with the claim above asserting ineffective assistance in the failure to raise competency, this claim is judged under the standards of > Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on this claim, Matheney must establish two *866 elements: first, that counsel's performance fell below an objective standard of reasonably effective representation; and second, that the "deficient performance prejudiced the defense." > Id. at 687-88, 104 S.Ct. 2052. For the first prong, the petitioner must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." > Id. at 690, 104 S.Ct. 2052. On the second prong, the petitioner must show a "reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different." > Id. at 694, 104 S.Ct. 2052.

As a preliminary matter, the court must note that the State of Indiana has adopted standards for the appointment of qualified counsel in capital cases. > Rule 24 of the Indiana Rules of Criminal Procedure sets forth the qualifications counsel must possess in order to become appointed counsel

in a capital case.> [FN6] Although > Rule 24 was not in effect in its current state at the time of trial, it is clear from the record that Scott King was qualified under the rule to serve as lead counsel and that both Charley Lahey and Philip Skodinski were qualified to serve as co-counsel. Therefore, it is proper to conclude that Matheney's counsel as a whole had experience in capital
cases and with the requirements of presenting mitigation evidence on his behalf.

> FN6. > Rule 24 of the Indiana Rules of Criminal Procedures states in pertinent part as follows:
(B) Appointment of Qualified Trial Counsel.
Upon a finding of indigence, it shall be the duty of the judge presiding in a capital case to enter a written order specifically naming two (2) qualified attorneys to represent an individual in a trial proceeding where a death sentence is sought. The provisions for the appointment of counsel set forth in this section do not apply in cases wherein counsel is employed at the expense of the defendant.
(1) Lead Counsel; Qualifications. One (1) of the attorneys appointed by the court shall be designated as lead counsel. To be eligible to serve as lead counsel, an attorney shall:
(a) be an experienced and active trial practitioner with at least five (5) years of criminal litigation experience;
(b) have prior experience as lead or co-counsel in no fewer than five (5) felony jury trials which were tried to completion;
(c) have prior experience as lead or co-counsel in at least one (1) case in which the death penalty was sought; and
(d) have completed within two (2) years prior to appointment at least twelve (12) hours of training in the defense of a capital cases in a course approved by the Indiana Public Defender Commission.
(2) Co-Counsel, Qualifications. The remaining attorney shall be designated as co-counsel. To be eligible to serve as co-counsel, an attorney shall:

(a) be an experienced and active trial practitioner with at least three (3) years of criminal litigation experience;
(b) have prior experience as lead or co-counsel in no fewer than three (3) felony jury trials which were tried to completion; and
(c) have completed within two (2) years prior to appointment at least twelve (12) hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.

> [10]> [11] There isn't any question that the petitioner as a defendant in a capital criminal case is entitled to effective assistance of counsel in the penalty phase. The penalty phase often presents enormously difficult professional challenges and choices. > Resnover v. State, 460 N.E.2d 922 (Ind.1984), cert. denied, > Resnover v. Indiana, 469 U.S. 873, 105 S.Ct. 231, 83 L.Ed.2d 160 (1984), post-conviction relief denied, > Resnover v. State, 547 N.E.2d 814 (Ind.1989), cert. denied, > Resnover v. Indiana, 498 U.S. 881, 111 S.Ct. 216, 112 L.Ed.2d 175 (1990), habeas relief denied, > Resnover v. Pearson, 754 F.Supp. 1374 (N.D.Ind.1991), aff'd, > 965 F.2d 1453 (7th Cir.1992), cert. denied sub nom. > Resnover v. Carter, 508 U.S. 962, 113 S.Ct. 2935, 124 L.Ed.2d 685 (1993), denial of habeas aff'd, > Resnover v. Pearson, 9 F.3d 113 (7th Cir.1993), cert. denied sub nom. > Resnover v. Carter, 512 U.S. 1246, 114 S.Ct. 2769, 129 L.Ed.2d 883 (1994). The suggestion that *867 Dr. Morrison be called in the penalty phase of the trial involved a judgment call on the part of counsel and the petitioner as to whether or not Dr. Morrison would do more harm than good. That choice had to be made on the basis of a wide variety of factors that relate to what is persuasive at that critical juncture in a trial. The Indiana Supreme Court considered this issue in its decision on post conviction relief. > Matheney v. State, 688 N.E.2d 883, 898-99 (Ind.1997). That court found that the issue failed on the prejudice prong of the > Strickland standard. > Id. at 898. Although trial counsel may have erred in failing to bring Dr. Morrison back to the

stand during the penalty phase, "they did elicit testimony from her at the guilt phase which could support the presence of [the inability to conform] mitigator." > Id. Matheney argues that this logic exemplifies the circular reasoning condemned in > Hall v. Washington, 106 F.3d 742 (7th Cir.1997). In > Hall, the defense counsel failed to present several witnesses who would have testified to mitigating behavior, then compounded the error by making his closing argument based solely on personal and religious beliefs, with almost no reference to the mitigating factors in Hall's favor, > 106 F.3d at 750. The Seventh Circuit granted the writ, finding that counsel's failure to present mitigating evidence, combined with his legally inappropriate argument, resulted in deficient performance which was prejudicial to Hall. > Id. at 752. The trial court on post-conviction relief and the Illinois Supreme Court had found the newly offered mitigating evidence to be cumulative, but the Seventh Circuit found that where the sentencing court had found a total lack of mitigating evidence, "it is logically impossible for the new evidence to be 'cumulative' to something in the earlier record." > Id. While the trial court here did not find that the evidence supported the "inability to conform" mitigator, evidence was presented at trial to support that finding. More importantly, counsel did argue the presence of that evidence to the jury in his closing argument in the penalty phase. Unlike > Hall, where the mitigating evidence was not presented or argued to the court, the mitigating evidence was argued and presented here. Although eliciting further testimony from Dr. Morrison may have highlighted the relevant information for the jury and judge, it was not completely absent from the record. The decision of the Indiana Supreme Court that the failure to elicit additional testimony from Dr. Morrison during sentencing did not create "a reasonable probability that the result of the proceeding would have been different" was not unreasonable. See > Jones v.
Page, 76 F.3d 831 (7th Cir.1996).

VIII. "Lying in Wait" Aggravator Insufficient Evidence Claim

> [12] Matheney further argues that his Eighth and Fourteenth Amendment rights were violated because no reasonable trier of fact could have found beyond a reasonable doubt that the state established the elements for the "lying in wait" aggravating circumstance. Under > Lewis v. Jeffers, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990), this court is to determine whether a rational trier of fact could have found the aggravating circumstance beyond a reasonable doubt, viewing the facts in the light most favorable to the prosecution. The Seventh Circuit has explained that "federal review of these claims ... now turns on whether the state court provided fair process and engaged in reasoned, good-faith decisionmaking when applying > Jackson [v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)]'s 'no rational trier of fact' test." > Gomez v. Acevedo, 106 F.3d 192, 199 (7th Cir.) vacated on other grounds sub nom. > Gomez v. DeTella, 522 U.S. 801, 118 S.Ct. 37, 139 L.Ed.2d 6 (1997).

Among the statutory factors to be considered under the law of Indiana for the imposition of the death penalty, there is a so-called "lying in wait" factor. Such was considered by the Supreme Court of Indiana both on direct appeal and on the petition for post-conviction relief. The undisputed evidence is that this petitioner *868 parked his car two houses away from Bianco's house
despite the fact that there were no parked cars in front of that house. Footprints were found in a muddy alley that ran from where the petitioner parked his car to Bianco's backyard, and the shoes this petitioner was wearing at the time of his arrest were muddy. The backyard was isolated and secluded by dense brushes along the perimeter and was obscured by branches, a large wooden gate and the garage. Under these facts it was reasonable for the state trial court and the Supreme Court of Indiana to conclude that this petitioner used a circuitous route toward the victim's house in order to conceal himself from her. The time factor was also

considered and is important. In any event, no showing of a violation of the Eighth Amendment of the Constitution of the United States has been made.

IX. Vague and Overbroad Aggravator Claims

Matheney also asserts that his Eighth and Fourteenth Amendment rights were violated because Indiana's "lying in wait" and felony murder aggravating circumstances are vague and overbroad. The Supreme Court of the United States requires that aggravating circumstances in a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty." > Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." > Arave v. Creech, 507 U.S. 463,
474, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993).

Matheney first argues that the "lying in wait" aggravator is vague and overbroad. The Indiana Supreme Court defined this aggravator in > Davis v. State, 477 N.E.2d 889, 896 (Ind.1985) as "waiting, watching, concealment, and taking the victim by surprise." It requires "watching, waiting, and concealment from the person killed with the intent to kill or inflict bodily injury upon that person." > Id. The Indiana Supreme Court considered this argument both on direct appeal and on post-conviction relief and found that the definition adequately narrowed the class of persons eligible. This court does not find that determination unreasonable.

Similarly, Matheney argues that the felony murder aggravator is vague and overbroad because "the majority of homicides are committed in conjunction with another crime. See > Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)." > Matheney v. State, 688 N.E.2d 883, 905 (1997) and Petitioner's Memorandum in Support, p. 59. The Indiana Supreme Court considered the identical claim on post-conviction relief and determined that the felony murder aggravator was not overbroad because it applies to only to defendants who commit intentional murder

while committing specific other crimes. As the Indiana Supreme Court's decision was reasonable, no habeas relief is appropriate.

X. Incompetence to be Executed Claim

> [13] Petitioner's final claim in his petition is that he is incompetent to be executed. Under > Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), the Eighth Amendment prohibits execution of a defendant who is insane. The claim must be presented to the state court, however, when execution is imminent prior to obtaining federal relief. > Duckworth v. Serrano, 454 U.S. 1, 3, 102 S.Ct. 18, 70 L.Ed.2d 1 (1981). Petitioner has asked that this claim be dismissed without prejudice for refiling if appropriate at a later date under > Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998), and such will be done.

XI. Conclusion

In his dissent in > Coleman v. Balkcom, 451 U.S. 949, 955, 101 S.Ct. 2031, 68 L.Ed.2d 334 (1981), Justice Thurgood Marshall wrote that "[b]ecause of the unique finality of the death penalty, its imposition must be the result of careful procedures and must survive close scrutiny on post-trial review." This court has *869 closely scrutinized the record and finds no Constitutional errors therein. Specifically, the court holds that Matheney was competent to stand trial, and thus his due process right to be tried as a competent individual was not violated, nor was due process violated when the trial judge failed to sua sponte hold a competency hearing. Matheney's trial counsel were not ineffective when they failed to ask for a competency hearing and when they argued at the penalty and sentencing phases of the trial. The trial court's decision to bar the testimony of Prosecutor Barnes was not a violation of the Sixth and Fourteenth Amendments to the Constitution, nor was its use of the presentence investigation questionnaire a violation of the Eighth and Fourteenth Amendments. Finally, the evidence supported the "lying in wait" aggravator, and that aggravator

and the felony murder aggravator are not overbroad or vague. For those reasons, the court now DENIES Matheney's petition for writ of habeas corpus pursuant to > 28 U.S.C. S 2254, except for Claim XIII of the petition, which the court now DISMISSES without prejudice as premature. The clerk shall enter judgment accordingly.

IT IS SO ORDERED.

ORIGINAL

Supreme Court, U.S.
FILED
MAR 21 2002
CLERK

No. 01-1053

IN THE SUPREME COURT OF THE UNITED STATES

RONDLE ANDERSON,
Superintendent, Indiana State Prison,

Petitioner-Appellee,

v.

ALAN MATHENEY,

Respondent-Appellant.

Brief in Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED

When the Court of Appeals determines, and the State concedes, that a federal habeas petitioner has exercised due diligence and has not failed to develop his habeas claims in the state courts, may the Court of Appeals, in its discretion, remand to the federal district court to make factual determinations that the state court did not make, so that the disctrict court can resolve the merits of the claims presented in the habeas petition?

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STATEMENT OF THE CASE

In 1989, Alan Matheney was charged with murdering his ex-wife, Lisa Bianco, in St. Joseph County Indiana while on a 3 day prison pass. The State requested the death penalty. Defense counsel Lahey and Skodinski were appointed to represent him.

Pre-trial Proceedings

After their initial consultation with Matheney, his counsel learned that Mathaney believed that Bianco was having an affair with the local prosecutor, Michael Barnes, and that the two were the kingpins of a conspiracy to keep him in prison and do him harm. Matheney believed that his prosecution for capital murder was part of the conspiracy because Barnes wanted to forever silence Matheney about the affair. Matheney saw the actions of others, including his attorneys, as an extension of this conspiracy.

Matheney's counsel asked the trial court to appoint two experts to evaluate Matheney's competency to stand trial and his sanity at the time of the offence. Although the trial court granted the motion, the court never ordered the competency evaluation; the appointed psychologists, Drs. Batacan and Berkson, limited their examinations and reports to consideration of whether Matheney was legally insane (*i.e.*, whether he knew the difference between right and wrong) at the time of the offense. *Matheney v. Anderson*, 253 F.3d 1025, 1029-30 (7th Cir. 2000). Neither doctor rendered an opinion as to Matheney's competency to stand trial. *Id.* at 1032.

Subsequently, over the strenuous objection of his attorneys, Matheney filed a *pro-se* motion for a change of venue. At the hearing on the motion, Matheney (not his counsel) told the judge that he wanted the case moved because the conspiracy launched by Bianco and Barnes was preventing him from securing competent counsel, and because defense witnesses were being threatened and harassed. He claimed that he could prove that his family's phones were being tapped and insisted that he had consulted at 10 other lawyers, all of whom, unlike his appointed counsel, were concerned about these alleged phone taps. He also claimed that the police were breaking in to his relatives homes to steal evidence. *Matheney v. Anderson,* 60 F.Supp.2d 846, 850 (N.D. Ind. 1999); *see also Matheney*, 253 F.3d at 1032-33. The court moved the case to Lake County Indiana and a third lawyer, Scott King, was appointed to represent Matheney.

The Trial

Matheney relied on an insanity defense. A psychiatrist, Dr. Helen Morrison, was appointed to assist the defense. At trial, she testified that based on her examination, Matheney suffered from a severe paranoid disorder that impairs his perceptions of reality.

The trial evidence also included: a psychiatrist who had diagnosed Matheney with schizophreniform disorder prior to the offense, testified that Matheney suffered periods of "cognitive confusion" and paranoia; attorneys who had represented Matheney in civil actions described their observations of Matheney's delusional behavior; attorney Michael Scopelitis, who represented Matheney over a seven year period, explained that Matheney's behavior had become increasingly bizarre, paranoid and suicidal, and that he had questioned Matheney's competence to be sentenced on a confinement charge in

1987; and, Matheney's sisters testified that Matheney had exhibited delusional behavior while in jail awaiting trial by requesting copies of nonexistent documents that supposedly revealed the existence of his ex-wife's affair with the local prosecutor and its relation to his continued imprisonment.

Matheney was convicted and sentenced to death.

State post-conviction proceedings

In state habeas proceedings, Matheney alleged, *inter alia*: (1) that he was denied due process of law because was not competent to stand trial; (2) that he was denied due process because the state trial court failed order a *sua sponte* hearing on his competency; and (3) that his counsel were ineffective for failing to raise the issue of his competency at his capital trial. *Matheney,* 253 F.3d at 1035.

Matheney presented the deposition testimony of Dr. Morrison, who testified that based on her evaluation of Matheney at the time of his trial, she had concluded that he was not competent to stand trial. Dr. Morrison explained that due to his mental illness, Matheney could not rationally assist his attorneys or rationally understand the trial. *Matheney*, 253 F.3d at 1036, 1040.

Matheney also presented the deposition testimony of his three trial lawyers. His lawyers agreed that throughout their representation Matheney was obsessed with the idea that Barnes and Bianco were the kingpins of a conspiracy to falsely imprison him and insisted that this should be the basis of his defense. All agreed Matheney did not trust them.

King was lead counsel and by all accounts had the greatest role in preparing the

defense. When asked if Matheney was able to assist in his own defense, King testified that Matheney was of no assistance other than that his writings and conduct supported the insanity defense. King stated that Matheney "mentally and emotionally was not fully equipped." He explained that he attributed Matheney's lack of cooperation "partially because he couldn't because of his mental status. And I believe partially because he did not want to. You know, he's not a trustful person. I mean understandably so. I mean, it was part of his personality and makeup. That's consistent with the diagnosis given by Dr. Morrison."

Lahey testified that Matheney was of no assistance at all regarding any legitimate issue in the case, and that this contributed to the decision to rely on the insanity defense. According to Lahey, Matheney was "confused" at times and "kept popping off in court." Matheney was completely "obsessed" with his conspiracy theories and could not be reasoned with. Matheney sent counsel on wild goose chases and did not trust his lawyers. Lahey testified that Matheney was competent to the extent that Matheney knew "what day it was or who I was." Lahey testified that he did not know whether Matheney was mentally ill and did not feel qualified to make that assessment. He had not consulted with any of the mental health experts prior to trial.

Skodinski admitted to having a very limited role in the case. When asked if he thought Matheney was incompetent he said: "It depends on what you feel is competent. He certainly understood what he was charged with or what evidence to find he was not guilty. In that regard I guess he was competent to assist in his own defense." He admitted that had the psychiatrist told him that she thought Matheney was incompetent he would

have be obliged to request a hearing.

Lahey and Skodinski could not recall filing the motion seeking an evaluation of Matheney's competence. None of the attorneys could recall consulting with Drs. Berkson or Batacan. Neither Lahey nor Skodinski ever spoke with Dr. Morrison. King met with Dr. Morrison for 1 hour prior to trial, but did not discuss her opinion regarding Matheney's competence to stand trial.

Matheney's petition for post-conviction relief was denied. He raised the same three issues regarding his competency on appeal to the Indiana Supreme Court. That court addressed his claim of ineffective of assistance of counsel and denied relief. The Indiana Supreme Court did not address Mathaney's due process competency claims at all.

Federal Habeas Proceedings

In his federal habeas petition, Matheney again alleged: (1) that he was denied due process of law because was not competent to stand trial; (2) that he was denied due process because the state trial court failed to hold a competency hearing *sua sponte* competence to stand trial, and that his counsel were ineffective for failing to raise the issue of his competency at his capital trial. *Matheney,* 253 F.3d at 1038. The State claimed that Matheney had failed to present his due process competency claims in the Indiana Supreme Court, as evidenced by the fact that the Indiana Supreme Court failed to address them. The district court found that Matheney had fairly presented these claims, but that the Indiana State Court had failed to adjudicate them. Thus, the district court determined that the provisions of §2254(d) of the AEDPA do not apply to these claims and that Matheney was entitled to *de novo* review. *Matheney,* 60 F.Supp.2d at 860.

Based on the state court evidence and the court's own prior *ex parte* contact with Matheney, the federal district court determined that Matheney was competent at the time of his trial. *Matheney,* 253 F.3d at 1027. The court further held that Matheney's other claims concerning his competency were without merit. *Id.*

Proceedings in the Court of Appeals

Matheney appealed the district court's decision to the Court of Appeals for the Seventh Circuit. Matheney argued that the district court failed to apply the appropriate law and unduly disregarding portions of the evidence. Matheney asserted that there was a legitimate doubt as to his competency to stand trial and that the district court should not have made a retrospective determination of Matheney's competency or at should not have done so without an evidentiary hearing on his claims.

The State again argued that Matheney's due process competency claims were waived because he failed to present them to the Indiana Supreme Court.

The Seventh Circuit panel reviewed the record in this case and unaminously found that "given that a legitimate question has been raised as to Matheney's competency to stand trial and his lawyer's performance on that issue, we remand the case for an evidentiary hearing." *Matheney,* 253 F.3d at 1025, 1028. The panel specifically ordered that the court hold this hearing to determine: "whether Matheney was competent to stand trial in 1990; . . and [] whether the state trial court was obligated to hold a competency hearing *sua sponte*." *Id.* at 1040-41.

Regarding Matheney's ineffective assistance of counsel claim, the Court emphasized that it was extremely concerned that Matheney's trial counsel (and the trial

court) had failed to follow through on counsel's request for a competency evaluation and expressed doubts as to whether the record could support that this was a reasonable decision. *Id.* at 1032, 1040. The court explained that the record was "at best, unclear" regarding counsel's rationale for this behavior. *Id.* at 1040. Thus the Court also asked that the district court determine "whether Matheney's counsel were ineffective when they failed to pursue the initial request for a competency hearing." *Id.* at 1040-41.

The Court observed that such a hearing was not precluded be 28 U.S.C. § 2254(e)(2) because neither Matheney nor his counsel had failed to develop the facts in support of his claims in state court. *Matheney*, *Id.* at 1039. The Court also found that the Indiana State courts had failed to even address Matheney's due process competency claims, and agreed with the district court that the state court's had failed to afford Matheney a full and fair hearing on his competency claims. *Id.* at 1039.

In ordering the remand, the Court specifically advised that the district court should consider the evidence already in the state court record (e.g., trial counsel's depositions and the various psychiatric evaluations). The Court also advised that the district court could consider "additional information," including "additional psychiatric analysis" should the court decide it would be helpful. *Id.* at 1041 & n. 16.[1]

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[1]In support of the latter, the Court explained that if a habeas petitioner's mental illness is a permanent condition, further psychiatric analysis could be relevant, citing to *United States v. Franzen*, 686 F.2d 1238, 1247 (7th Cir. 1982). In *Franzen*, the court explained that, "[a]lthough there are obvious hazards attendant with retrospective competency hearings, see *Drope v. Missouri*, 420 U.S. 162, 182 (1975) and *Pate v. Robinson*, 383 U.S. 375, 387 (1966), the mere passage of time may not make the effort meaningless, " and went on to order that the district court should conduct such a hearing if it finds "that such a hearing would still be meaningful." *Franzen*, 686 F.2d at 1246-47.

The State's petition for a rehearing and rehearing *en banc* regarding this decision was denied.[2]

REASONS TO DENY THE WRIT

I. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION REGARDING THE PROVISIONS OF 28 U.S.C. § 2254(E)(2) BECAUSE THE COURT OF APPEALS FOUND, AND THE STATE CONCEDES, THAT MATHENEY DID NOT FAIL TO DEVELOP THE FACTUAL BASIS OF HIS CLAIMS IN STATE COURT

In his petition for a writ of certiorari, The State repeatedly asserts that Matheney has "exercised the required diligence" and "sufficiently developed the factual record" in the state courts to support his competency claims.[3] Nevertheless, The State asserts that the primary reason his petition should be granted is because the Court of Appeal's decision to remand Matheney's case to the district court is inconsistent with the

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[2]Matheney's request for a rehearing, referenced in the Petition for Writ of Certiorari at 5, did not request rehearing regarding the Court's decision relating to Matheney's competency claims.

[3]*See* Pet. at 9("Matheney is not entitled to an evidentiary hearing to determine whether he was competent to stand trial because he exercised the required diligence to make the claim he was not competent."); Pet. at 9 ("Matheney sufficiently developed the factual predicate to this claim in state court to disallow himself and evidentiary hearing."); Pet. at 10 ("Matheney argued and presented evidence at the [state] post-conviction proceedings that he was not competent."); Pet. at 10 ("At each and every stage of this proceeding, Matheney has diligently argued, and when possible, presented evidence that he was not competent [to stand trial]. The factual predicate to Matheney's claim was not only discovered, but litigated, prior to the filing of the petition for a writ of habeas corpus."); Pet. at 13 ("The factual basis of the claim was developed, therefore there is no need for an evidentiary hearing."); Pet. at 14 ("Matheney is not entitled to an evidentiary hearing because the record shows thorough investigation of the factual predicate of this claim in the state proceedings."); Pet. at 16 ("There is sufficient information in the record to determine whether the trial court should have ordered an evaluation [of Matheney's competence] *sua sponte*.").

provisions of 28 U.S.C. § 2254(e)(2) and this Court's decision *Williams v. Taylor*, 529 U.S.420 (2000).

As this Court explained in *Williams*, §2254(e)(2)'s bar on federal evidentiary hearings "applies only to prisoners who have 'failed to develop the factual basis of a claim in State court proceedings'" as a result of "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 430-31. Here, where The State does not even argue that Matheney failed to adequately develop the factual basis of his claims in state court, but in fact *agrees* with the Court of Appeal's determination that Matheney did not "fail to develop the factual basis of his claim[s] in State court proceedings," *Matheney*, 253 F.3d at 1038-39, The State has not shown how §2254(e)(2) or this Court's decision in *Williams v. Taylor* are even implicated in this case, let alone "inconsistent" with the Court of Appeal's decision.[4]

II. THE STATE'S ASSERTIONS THAT A HEARING IS UNWARRANTED BECAUSE ANY EVIDENCE CONSIDERED AT THAT HEARING WOULD BE CUMULATIVE DOES NOT PRESENT A SUBSTANTIAL OR A RIPE ISSUE FOR REVIEW

The State also repeatedly asserts that's the Court of Appeals should not have remanded to the district court because the evidence Matheney already presented in state court is sufficient to enable the Court of Appeals to resolve Matheney's claims and any *additional* evidence Matheney seeks to present on remand "will offer no better evidence

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[4]In his second argument, The State further claims that "the issue is whether Matheney satisfied § 2254(e)(2)(A)(ii)." "Only a prisoner who has neglected his rights in state court need satisfy [the conditions of §2254(e)(2)(A)(ii) or (B)]." *Williams*, 529 U.S. at 1490. As the Court of Appeals found, and The State repeatedly concedes, Matheney did not fail to develop his claims in state court and thus the exceptions to §2254(e)(2) are not applicable.

than that already present in the record." Pet. at 11; *see also* Pet. at 14, 16. The State fails to mention that when the Court of Appeals remanded this case, the Court specifically advised that the district court should consider the evidence "already in the [state court] record." *Matheney*, 253 F.2d at 1041. The Court of Appeals also advised that the district court "may well desire to consider any additional information that would assist the court." *Id.* To the extent The State is asserting that the district court should not hear such additional evidence because it would only be cumulative to that which has already been presented, *see* Pet. at 11, The State is free to object on this and any other ground when *and if* the district court decides to it would like to hear additional evidence.

III. THE STATE'S ASSERTION THAT THE COURT OF APPEALS REMAND SOMEHOW RUNS AFOUL OF THE PROVISIONS OF SECTION 2254(d) OF THE AEDPA ALSO FAILS RAISE A SUBSTANTIAL FEDERAL QUESTION

A. As the Indiana Supreme Court did not address Matheney's due process competency claims, § 2254(d) does not apply

The State asserts the Court of Appeals should not have remanded to the district court to determine whether Matheney was incompetent to be tried in 1990 because "the decisions of the Indiana Supreme Court and the district court concerning Matheney's competence were not contrary to or an unreasonable application of this Court's precedent in this area." Pet. at 11.

First, as both the district court and the Court of Appeals found, the Indiana Supreme Court failed to address, and thus did not adjudicate, Matheney's due process competency claim. *Matheney*, 253 F.3d at 1039.

In addition, The state has never before asserted that the Indiana Supreme Court

adjudicated Matheney's due process claims: in both the federal district court and in the Court of Appeals, The State argued (albiet unsucessfully) that Matheney's due process competency claims were "procedurally defaulted" because he failed to present them to the state court. The State specifically claimed that the fact that Indiana Supreme Court did not address these claims supported this argument. Thus, to the extent that The State is now arguing that the Court of Appeals should have applied the provisions of §2254(d) in assessing the merits of Matheney's claim, their failure to present such an argument during the proceedings below should preclude this Court from granting the writ to consider it now.

When a federal habeas petitioner has alleged that his due process rights were violated because he was incompetent to stand trial, the court should: 1) determine whether the evidence demonstrates that there is a legitimate doubt that the petitioner was competent to stand trial; 2) if so, then determine whether a meaningful retrospective competency hearing is possible; and 3) if so, hold such a hearing, or if not, vacate the petitioner's convictions. *Drope v. Missouri*, 420 U.S. 162, 172,183 (1975); *Pate v. Robinson*, 383 U.S. 375, 385-87 (1966). The Court of Appeals reviewed the record in this case and unaminously found that "given that a legitimate question has been raised as to Matheney's competency to stand trial and his lawyer's performance on that issue, we remand the case for an evidentiary hearing." 253 F.3d 1025, 1028. The Court's decision to remand for a hearing to determine whether Matheney was competent to stand trial in

1990 was nothing more than an application of a well established legal standard[5] to the factual record before the court, and thus will have little impact beyond this particular case.

B. The Court of Appeal's remand for the purpose of determining whether counsel were ineffective for failing to pursue their initial request for a competency hearing is not prohibited by §2254(d)

The State also claims that the Court of Appeals should have resolved the merits of Matheney's ineffectiveness claim without a remand, asserting that "the findings of the Indiana Supreme Court should be given deference. 28 U.S.C. §2254(d); *[Terry] Williams*, 529 U.S. [362], 376 [2000]." Pet. at 15.

To the extent that The State means to assert that the Court of Appeals has failed to afford the proper deference to the Indiana Supreme Court's factual findings, The State: (1) fails to identify any instance where this occurred; and, (2) neglects to mention that the state court *failed to make any factual findings* that would be entitled to deference regarding the particular issues that caused the Court of Appeals to remand the case. To the extent that The State means to assert that the Court of Appeals failed to afford the proper deference to the Indiana Supreme Court's *decision* on Matheney's *Strickland*

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[5] This case is certainly not the only case to have ordered or considered a remand under these circumstances. *See, e.g., United States v. Giron-Reyes*, 234 F.3d 78, 83 (1st Cir. 2000); *United States v. Auen*, 846 F.2d 872, 878 (2nd Cir. 1988); *United States v. Renfroe*, 825 F.2d 763, 767 (3rd Cir. 1987); *United States v. Mason*, 52 F.3d 1286, 1293 (4th Cir. 1995); *Acosta v. Turner*, 666 F.2d 949, 956 (5th Cir. 1982); *Pate v. Smith*, 637 F.2d 1068, 1072-73 (6th Cir. 1981); *Gossier v. Welborn*, 175 F.3d 504, 507 (7th Cir. 1999); *Reynold v. Norris*, 86 F.3d 796, 802-03 (8th Cir. 1996); *Oodle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001); *McGregor v. Gibon*, 248 F.3d 946, 961-62 (10th Cir. 2001); *James v. Singletary*, 957 F.2d 1592, 1570-71 & n. 11 (11th Cir. 1992).

claim under the provisions of 2254(d), The State is urging this Court to review the merits of a decision that Court of Appeals has yet to make.

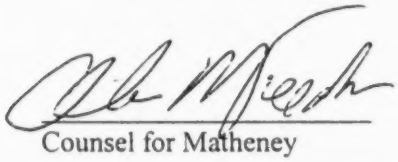
The Court of Appeals was very clear in its opinion that the specific issue pertaining the ineffectiveness claim that it wanted resolved was whether or not there was any reasonable justification for counsel's failure to obtain a competency evaluation after they had initially represented to the trial court that such an evaluation was required. *Matheney*, 253 F.2d at 1032, 1040. The Court of Appeals observed that the state court record (which included the testimony of trial counsel regarding the competency issue) does not appear to support that there was a reasonable explanation for trial counsel's failure to obtain a competency evaluation. *Id.* at 140. The Court of Appeals also observed that the post-conviction testimony of the defense expert stating that based on her evaluation at the time of trial she believed Matheney was not competent to assist in his defense was sufficient to create a legitimate doubt as to Matheney's competency. The state court's fact findings did not address these matters. Although it is unclear, the Indiana Supreme Court's decision appears to presume that the court appointed experts *did* render an opinion regarding Matheney's competency, *see Matheney v. State*, 688 N.E2d 883, 899 (Ind. 1997), even though, as both the district court and the Court of Appeals discuss at length, the record clearly shows that neither expert actually performed a competency evaluation or rendered an opinion regarding Matheney's competency. *Matheney*, 253 F.2d at 1029-1032; *Matheney*, 60 F.Supp.at 849-50. The Indiana Supreme Court's decision ***fails to even mention*** the post-conviction testimony of the defense expert concerning her assessment of Matheney's competency at the time of trial.

Even under the provisions of § 2254(d), the federal habeas court need not defer to a state court decision if the state court determination "was unreasonable insofar as it failed to evaluation the totality of the . . . evidence." *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000); *id.* at 416 (O'Conner, J. concurring) or if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2). Given the state court's failure to make adequate factual findings regarding this issue, and the fact that the case was otherwise being remanded regarding Matheney's due process competency claims, the Court of Appeals remand for a determination of this claim was not an abuse of discretion.

CONCLUSION

For the forgoing reasons, Matheney respectfully requests that this Court deny The State's Petition for a Writ of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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